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No. 86-_____

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1986

MORRIS THIGPEN, COMMISSIONER, ET AL.,

PETITIONERS

VERSUS

MARION ALBERT PRUETT

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Certiorari shoud be granted where the Court of Appeals erred in holding that the Mississippi Supreme Court did not regularly and strictly impose its procedural bar and therefore Respondent's claim of improper closing argument was not procedurally barred from its consideration by Wainwright v. Sykes and Engle v. Isaac.

2. Certiorari should be granted where the Court of Appeals held that the Respondent's failure to challenge a juror premptorily when it could did not cure the error in the trial court failing to excuse a juror for cause.

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NO. 86-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MORRIS THIGPEN, COMMISSIONER, ET AL.,

Petitioners

vs.

MARION ALBERT PRUETT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, State of Mississippi, respectfully prays that the Petition for Writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals that forms the basis of this petition is unpublished, and may be found in the Appendix at

A 1- A18 . See: Pruett v. Thigpen, 809 F.2d 1032 (5th Cir. 1986).

Other opinions below pertinent to the determination of this case are:

State Court: Respondent's original conviction and sentence of death were affirmed the Mississippi Supreme Court by written opinion reported as Pruett v. State, 431 So.2d 1101 (Miss. 1983). A200. Pruett's application for leave to file a petition for writ of error coram nobis was denied by written opinion. Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984). A138

United States Supreme Court: This court's denial of respondent's petition for writ of certiorari subsequent to his Direct Appeal is reported as Pruett v. Mississippi, ___ U.S. ___, 104 S.Ct. 3558, 82 L.Ed.2d 860 (1983).

United States District Court: The District Court opinion granting the writ of habeas corpus as to the conviction and sentence not reported, but may be found in

corpus as to the conviction and sentence not reported, but may be found in the appendix at A19-A127. An earlier opinion written in denying the State's Motion for Summary Judgment was likewise unreported, but may be found in the appendix at A128.

JURISDICTION

Petitioner invokes the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States VI, VIII and XIV. Petitioner also relies on Section 28 U.S.C. § 2254 (a), viz., ". . . a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody

pursuant to a judgment of the State Court only on the ground that he is in custody in violation of the Constitution or laws ... of the United States".

STATEMENT OF THE CASE

A. Substantive Facts

The facts of this case are adequately set forth in the opinion of the Mississippi Supreme Court reported as Pruett v. State, 431 So.2d 1101, 1102-1103 (Miss. 1983).

B. Procedural History

Respondent, Marion Albert Pruett, was indicted for the September 17, 1981 capital murder of Opal H. Lowe a/k/a Peggy Lowe by the Grand Jury of the Circuit Court of Hinds County, Mississippi, First Judicial District, during the November Term 1981. Prior to indictment, a hearing was held before the Honorable William F. Coleman,

Circuit Judge, concerning the appointment of counsel. During said hearing, the respondent indicated that he desired to represent himself. A lengthy hearing was conducted, and the Court found that respondent knowingly and intellegently waived his right to have counsel appointed to represent him. However, as a precautionary measure, the Court, due to respondent's unfamiliarity with State criminal and trial procedure appointed two attorneys as advisory counsel.

Respondent filed a motion for change of venue and the same was granted with no opposition by the state. The case was transferred to the Circuit Court of Lowndes County, Mississippi to be tried during the January 1980 Term. His bifurcated trial was conducted under the procedures set forth in Sections 99-19-101 to 197, Miss. Code Ann. Supp. 1977), and Jackson v. State, 337 So.2d

1242 (Miss. 1976). The jury found respondent guilty of capital murder and then after hearing additional testimony and arguments of counsel returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the conviction and sentence of death were affirmed on February 23, 1983. Pruett v. State, 431 So.2d 1101 (Miss. 1982). Respondent's petition for rehearing was denied on March 16, 1983.

Respondent then filed a petition for writ of certiorari to the Mississippi Supreme Court with this Court. In due course the petition was denied on March 28, 1983. Pruett v. Mississippi, ___ U.S. ___, 104 S.Ct. 3558, 82 L.Ed.2d 860 (1983).

Upon denial of certiorari, respondent filed an application for leave to file a petition for writ of error coram nobis with

the Mississippi Supreme Court. See Miss. Code Ann. § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen. Laws 1984). On January 11, 1984, in a written opinion the Mississippi Supreme Court denied the application. The Court noted that the issues which had been litigated on direct appeal were res judicata and those which had not been reaised were forfeited. Pruett v Thigpen, 444 So.2d 819 (Miss. 1984).

Respondent then filed a petition for writ of habeas corpus with the United States District Court for the Nothern District of Mississippi. In response to the state's motion for summary judgment the District Court, on November 21, 1984 issued its memorandum order in this case denying the motion for summary judgment on the basis that Mississippi had no procedural bar in effect at the time that respondent's direct appeal was taken and that the court would consider each claim on the merits. On March 21, 1986 the District Court entered its

memorandum opinion granting habeas relief for a guilt phase error and ordering the State to release respondent form custody or retry him within 120 days.

Both the State and respondent appealed this decision to the United States Court of Appeals for the Fifth Circuit. The Court of appeals affirmed the judgment of the District Court on November 7, 1986. The Fifth Circuit, in its opinion, relied on its ruling in Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), presently pending on petition for writ of certiorari as Thigpen v. Wheat, No. 86-1032, to justify reaching the merits of the issue and affirming the District Court.

Because of the vitiation of approximately seven decades of Mississippi law by the Fifth Circuit and the District Court, the State brings this instant petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit and District Court erred in concluding that the holding by the Mississippi Supreme Court in Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984), denying coram nobis relief on the basis that respondent's claims, which could have been raised on direct appeal but were not were forfeited, was a radical departure from prior precedent. The courts below further erred in not holding the District Court was precluded from reaching the merits of the claim concerning the seating of a juror absent a finding of cause under Wainwright v. Sykes. The State contends that the decision from both a historical and legal standpoint is erroneous in that the Mississippi Supreme Court has traditionally found that the scope of post-conviction review is extremely limited. Concomitantly, the Mississippi Supreme Court opinion was in

specific compliance with Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), with written findings to the effect that certain claims had been forfeited. Finally, the lower federal court's have placed an unduly restrictive interpretation on the "lack of regular enforcement" rule discussed in Barr v. City of Columbia, 378 U.S. 146, 84, S.Ct. 1734, 12 L.Ed.2d 766 (1964), and by doing so have abolished the State Court's rights to remedy plain error and manifest injustice. For these reasons certiorari should be granted.

In addition when the Court of Appeals addressed the State's contention that the merits were wrongly decided, it erred in holding that respondent's failure to premptorily challenge the juror when they had the opportunity does not bar respondent's claim.

ARGUMENT

1. Certiorari should be granted where the Court of Appeal erred in holding that the Mississippi Supreme Court did not regularly and strictly impose its procedural bar and therefore Respondent's claim of improper closing argument was not procedurally barred from its consideration by Wainwright v. Sykes and Engle v. Isaac.

The Court of Appeals and the District Court relying on Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986); Hathorn v. Lovern, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) and Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), held that the Mississippi Supreme Court had not clearly announced nor had it regularly-

and systematically applied its procedural rule that barred a person convicted of a crime from raising claims in a postconviction proceeding that he could have raised on direct appeal, but failed to do so. The court below held in Wheat, that the failure of the Mississippi Supreme Court to clearly announce it's procedural rule or to "regularly or strictly" apply it created a situation where the federal courts did not have to honor them. In so holding the Court of Appeals was able to reach the merits of a claim of the improper seating of a juror. The claim concerning the juror could have been raised on direct appeal, however it was not raised until respondent filed his application for leave to file a petition for writ of error coram nobis in the trial court

(Mississippi's post-conviction proceeding at the time.) The Mississippi Supreme Court held the issue barred from its consideration for failure to object at trial and failure to raise the question on direct appeal. Pruett v. Thigpen, 444 So.2d 819, 824 (Miss. 1984). The Mississippi Supreme Court specifically relied on Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983), which relied on Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982); Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982), in holding the claims to be barred. The Mississippi Supreme Court also relied on Smith v. State, 434 So.2d 212 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Callahan v. State, 419 So.2d 165 (Miss. 1982); Holloway v. State, 261 So.2d 799 (Miss. 1972); Botts v. State, 210 So.2d 777 (Miss. 1968); and Cory v. Buddendorf, 98 Miss. 98, 54 So. 84 (1911).

In reversing the conviction and sentence the Court of Appeals ignored its own holdings recognizing the procedural bar in Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982) (failure to submit a jury instruction on a lesser included offense) and Young v. Herring, 777 F.2d 198, 203 (5th Cir. 1985) (failure to make a contemporaneous objection). The Fifth Circuit has even recognized Mississippi procedural bars in a post-Wheat context. See: Johnson v. Thigpen, 806 F.2d 1243, (5th Cir. 1986); Jones v. Thigpen, 795 F.2d 521, 522 (1986).

The Court of Appeal's application of Hathorn v. Lovern, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) and Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964), through Wheat, when considered in light of the consensus of

authority decided by the Mississippi Supreme Court on this subject is simply unwarranted. Historically speaking, Barr, was the culmination of a series of cases[3] decided by the United States Supreme Court arising from a number of civil rights demonstrations in the late 1950's and early 1960's and stood for the basic proposition that "state procedural requirements which are not strictly or regularly followed cannot deprive [the federal courts] of the right to review." 378 U.S. at 149, 12 L.Ed.2d at 769.

The question remains open as to the precise meaning of the phrase "strictly or regularly followed". To this end, there have been less than a plethora of decisions on point. For the most recent decision on this subject see:

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3 See: NAACP v. Alabama ex rel Flowers, 377 U.S. 288 (1964); Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964); Wright v. Georgia, 373 U.S. 284 (1963); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1963).

James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). We find some guidance in the case of Bouie v. City of Columbia, 379 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), a companion case to Barr. In summarizing the concept of the Barr "rule of consistence," this Court stated:

> The basic due process concept involved is the same as that which the court has often applied in holding that an unforeseeable and and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court' review of a federal question. See e.g., Wright v. Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 354, 83 S.Ct. 1240 (1963); NAACP v. Alabama, 357 U.S. 449, 456-458, 2 2 L.Ed.2d 1488, 1496, 78 S.Ct. 1163 (1958); Barr v. City of Columbia, 378 U.S. 146, 12 L.Ed.2d 766, 84 S.Ct. 1734. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitled him. In both situations "a federal right turns upon the status

of state law as of a given moment in the past - or, exactly, the appearance to the individual of the status of state law as of that moment . . . ." 109 U.Pa.L.Rev., supra, at 74, n. 34. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678, 74 L.Ed. 1107, 1112, 50 S.Ct. 451. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively for past conduct, the effect is to deprive him of due process of law in the sense of fair warning in that his contemplated conduct constitutes a crime. Applicable to either situation is the Court's statement in Brinkerhoff- Farris, supra, that "if the result above stated were attained by an exercise of the State's legislative process, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "violation is nonetheless clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." Id., at 679-680, 74 L.Ed. at 1112,1113.

378 U.S. at 354-55.

When viewed in the context of the historical application of the writ of error coram nobis after affirmance on direct appeal the conclusion reached by the court below is unsupportable. While clearly there may have been a deviation or two from the strict standard over the years this conduct could clearly be laid at the feet of the Federal Judiciary. See: Fay v. Noia, 372 U.S. 391, 9L.Ed.2d 837, 83 S.Ct. 822 (1963). Accord: Goldsby v. State, 226 Miss. 20, 86 So.2d 27 (1956); Goldsby v. Harpole, 249 F.2d 417 (5th Cir. 1957); Brown v. State, 173 Miss. 543, 158 So.2d 339 (1935), rev'd 297 U.S. 278, 56 461, 80 L.Ed. 2d 682 (1936).

The court below has previously held that minor deviations are simply insufficient to invalidate the procedural bars imposed by a state court. Taken to its logical

conclusion, the decision here is unthinkable, in that the State courts could never invoke its authority to remedy plain error or prevent manifest injustice without risking total federal intervention into all cases. This is so because the plain error rule is invoked to address questions not properly preserved or properly raised by a defendant. By excusing a procedural default to address plain error the State court then fails to "regularly or strictly" apply its procedural rules. Clearly under Sykes and United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), such could be argued as violation of due process as an unforseen change in the law. This decision means that the state courts must give rate adherence to the rules of procedure regardless of the violation's significance.

The Court of Appeals further ignored its own precedent in Henry v. Wainwright, 686 F.2d 315 (5th Cir. 1982). It will be remembered that the Fifth Circuit originally held in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), that because the Florida Supreme Court had excused procedural defaults in similar circumstances in other cases that the federal courts did not have to recognize the procedural bar Henry's case. This Court in Wainwright v. Henry, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), vacated the judgment of the Court of Appeals and remanded the case for further consideration in light of Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). On remand, the Court in reaching the merits of the claim stated:

> In the situation presented here, where the state court's opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits.[4]

---

[4] Otherwise, federal review would unjustly be denied a prisioner who has no way of

> proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.
>
> The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default on another case allows a federal court to excuse a default in a case where the state courts have not. Instead we have looked to florida law to determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140,149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979).
>
> [Emphasis added] 686 F.2d at 314.

The Mississippi Supreme Court clearly imposed the procedural bar in this case refusing to excuse the procedural default. The Court of Appeals although presented with

arguments concerning the precedent in Henry, did not even mention it the present opinion or the Wheat opinion.

Even more suprising we find the the precedent established in Bass v. Estelle, 696 F.2d 1154, reh'g. denied, 705 F.2d 121 (5th Cir.1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983), similarly ignored. A similar claim was made in Bass. The Court stated in footnote 4:

> 4. Bass also appears to contend that since on occasion the Texas court addresses the merits of claimswhich it might have viewed as waived, and that when it does so we consider ourselves authorized to do likewise, e.g., Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc 626 f.2d 396 (1980), we must disregard the state's contemporaneous objection rule in all cases. We have recently rejected this contention. Speaking of our practice of reaching the merits where the state court has done so, rather than resting on procedural default, we explained:

Otherwise, federal review would unjustly be denied a prisioner who has not way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default on another case allows a federal court to excuse a default in a case where the state courts have not. Instead we have looked to florida law to determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979). Henry v. Wainwright, 686 F.2d 311, 314 n.4 (5th Cir. 1982).

[Emphasis added] 696 F.2d at 1157-58.

On petition for rehearing in Bass the Court of Appeals stated:

> As for the second contention, we do not regard an occasional act of grace by the Texas court in entertaining the merits of a claim that might have been viewed as waived by procedural default to constitute such a failure to strictly or regularly follow the state's contemporaneous objection rule as permits us to disregard that rule generally, or where the state court has not done so. The basis of this claim is Barr v. Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.E.2d 766 (1964), a civil rights case in which the Court refused to accept the generality of exceptions as an independent and adequate state ground barring constitutional review, where the Court was able to point to four separate decisions from the same state court, all handed down within weeks of that before it for review, deeming identical exceptions sufficient. Such selective constructions of identical language are a far cry from our case. Moreover, we do not regard as dicta the language quoted by us in our original opinion from Henry v. Wainwright, 686 F.2d 311, 314 n. 4 (1982); and since it is not we are bound by it. Instead, it is a holding, voiced in response to a party's

> contention, that we will not excuse a procedural default in a case where state courts have not done so. Until such constructional legerdemain as occurred in Barr is drawn before us, we see no occasion to re-examine that holding; and no such thing is apparent here.
>
> 705 F.2d at 122-23.

See: Booker v. Wainwright, 764 F.2d 1371, 1378-80 (11th Cir. 1985), cert denied, ___ U.S. ___, 106 S.Ct. 339, 88 L.Ed.2d 324 (1986)(Addressing regular enforcement of procedural bar of failure to raise question on direct appeal.)

The conclusion is inescapable that even where a procedural bar exists, it does not have to be applied in every instance conceivable in order to survive a challenge against its regular and systematic enforcement. In holding that it has to be applied in every instance that it could conceivably be applied the Court of Appeals has clearly

circumvented the proscription in Sykes and Isaac against the federal court's intrusion into such areas.

In reaching the flawed conclusion in Wheat, that Mississippi has never clearly announced nor had it regularly and systematically applied its procedural bar, the Court of Appeals relied on cases in a totally different procedural posture from that of respondent's case. In Mississippi prior to 1984, petitions for post-conviction relief fell into two categories; (1) petitions for writ of error coram nobis filed in the trial court when no appeal has been taken from the conviction or guilty plea and (2) applications for leave to file a petition for writ of error coram nobis in the lower court filed in the Mississippi Supreme Court in situations where the conviction and sentence have been affirmed on appeal. In re Broom's Petition, 168 So.2d 44, 48 (1964), sets forth the

distinction between these two types of post-conviction proceedings. Traditionally in cases where no appeal was taken the conviction and sentence are not accorded the same finality those affirmed on appeal are accorded. Therefore when a petition was filed in the lower court, where no appeal had been taken, the trial court could address the merits. This decision could then be appealed to the state supreme court and the Mississippi Supreme Court would address the merits of properly preserved questions raised as it would in any other direct appeal.

However, in the second category, if a conviction and sentence have been appealed and affirmed, it takes on a different mantel of finality. The only way that a post-conviction petition could be brought after affirmance on appeal was under the provisions of Miss. Code Ann., § 99-35-145 (1972) (Repealed April 17, 1984, by § 99-39-1 et seq., Miss. Code Ann. (Supp.

1984)). Section 99-35-145 provided that after affirmance on appeal an application for leave to file a petition for writ of error coram nobis in the lower court must be filed with the Mississippi Supreme Court. The Court would then consider the application and either deny it or grant leave to file in the lower court. The only questions the court traditionally considered on the merits in a application for leave to file in the lower court, were questions of ineffective assistance of counsel [793 F.2d at 625, n. 3], newly discovered evidence and the effect of intervening decisions of the United States Supreme Court on convictions, other issues were held to be barred. Respondent's case falls into this second category as he appealed his conviction and sentence and they were affirmed on appeal. From 1956 until the time of the decision in respondent's case, in 1984, there are only

twenty-eight (28) written opinions in cases in the same posture as respondent's case. These cases are: King v. Thigpen, 441 So.2d 1365 (Miss. 1983); Evans v. State, 441 So.2d 520 (Miss. 1983), cert den. ___U.S.___, 104 S.Ct. 3558, 82 L.Ed.2d 8601 (1984); Smith v. State, 434 So.2d 212 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Wheat v. Thigpen, 431 So.2d 486 (1983); Callahan v. State, 426 So.2d 801 (Miss. 1983); Culberson v. State, 412 So.2d 1184 (Miss. 1982); In re Jordan, 390 So.2d 584 (Miss. 1980); Bell v. Watkins, 381 So.2d 118 (Miss. 1980); Auman v. State, 285 So.2d 146 (Miss. 1973); Spears v. State, 278 So.2d 443 (Miss. 1973); Brown v. State, 275 So.2d 103 (Miss. 1973); Holloway v. State, 261 So.2d 799 (Miss. 1972); Murphree v. State, 222 So.2d 694 (Miss. 1969); Irving v. State, 194 So.2d 239 (Miss. 1967); Yates v. State, 189 So.2d 917 (1966); Thompson v. State, 188

So.2d 239 (Miss. 1966); Fondren v. State, 187 So.2d 327 (Miss. 1966); Riley v. State, 183 So.2d 819 (Miss. 1966); Riley v. State, 182 So.2d 397 (Miss. 1966); In re Woodruff's Petition, 179 So.2d 268 (Miss. 1965); In re Broom's Petition, 168 So.2d 44 (Miss. 1965); Harvey v. State, 168 So.2d 49 (Miss. 1964); Thornhill v. State, 149 So.2d 27 (Miss. 1963); Kennard v. State, 148 So.2d 660 (Miss. 1963); Rogers v. State, 130 So.2d 856 (Miss. 1961); Conn v. State, 123 So.2d 859 (Miss. 1960); Lang v. State, 92 So.2d 670 (1957).

The Court of Appeals, for the most part, ignored these cases and instead relied mainly on cases in the other category on which to premise its irregular inforcement decision. The state would submit the cases in the same procedural posture as respondent's are the cases that the Court must consider in determining whether or not

the procedural bar is clearly announced and regularly and systematically applied in light of Hathorn, Barr, Bass and Henry.

As the Court of Appeals admits, it did not do an exhaustive review of cases where the Mississippi Supreme Court has decided error coram nobis cases. This is the fatal flaw in the decision of the Court of Appeals decision. Feeling that some indepth consideration is necessary we proceed. As noted during the time period between 1956 and the 1984 date of respondent's application, the Mississippi Supreme Court decided, with written opinion, twenty-eight (28) cases in the same procedural posture as that of respondent's case, ie. an application for leave to file a petition for writ of error coram nobis in the lower courtfiled with the Mississippi Surpeme Court, as allowed by Section 99-35-145, Miss. Code Ann. (1972) (Repealed April 17, 1984, by Section 99-39-1, et seq.).

In the Wheat opinion, relied on in reversing this case, the Court of Appeals recognized that ineffective assistance of counsel claims are treated differently than other claims. 793 F.2d at 625, n. 3. Of the twenty-four (24) cases listed above six (6) cases contained questions of ineffective assistance of counsel, in some they were addressed on the merits and in others they were held to be barred. King; Smith; Wheat; Callahan; Culberson; Bell; Yates; Fondren; Thornhill; Rogers. These cases cannot form the basis of holding that Mississippi does not impose its procedural bar regularly and systematically, as the Mississippi Supreme Court does not impose a bar until a defendant has had at least one opportunity to have his claim of ineffectiveness addressed. Read v. State, 430 So.2d 832 (Miss. 1983).

Another type of claim comes in for special treatment as we mentioned above. This is a claim of newly discovered

evidence. The Mississippi Supreme Court created this procedure for raising claims of newly discovered evidence in Lang v. State, supra. This claim by its very nature must have its merits examined, first to see if the petitioner knew or should have known of this claimed new information at the time of trial. If he did then a bar will be imposed. Secondly if it was not known then the Court must look at the merits to determine if it falls into the purview of Lang. See: Kennard; Murphree.

Of the twenty-eight (28) applications written on by the Mississippi Supreme Court only four (4), arguably, have been addressed on the merits. In 1965, the Mississippi Supreme Court spoke to the merits in In re Woodruff's Petition, the reason the Court did so was that petitioner's counsel had perfected an appeal, but never filed a brief. The appeal was dismissed for lack of prosecution. The Court treated the dismissal as an affirmance and allowed an application for leave to proceed in the lower court to be filed. It is clear that

the case was addressed on the merits because counsel had failed in his duty to file briefs or assignment of errors. This was an ineffective assistance of counsel case and therefore not subject to a bar. Therefor no procedural bar was imposed.

The next case in which there was a failure to impose the procedural bar was Thompson v. State. The Court stated its reason for not imposing the bar as follows:

> Since there is some doubt[1] raised as to whether or not there is an effective waiver of a federal constitutional right by the failure to raise such right during the trial, we are of the opinion in the instant case that the petition for a right to file an application for a writ of error coram nobis should be allowed, and petitioner should be permitted to file a petition in the Circuit Court of Attala County, Mississippi.

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[1] Henry v. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

188 So.2d at 239.

Here it is clear that the confusion over the opinion in Henry v. Mississippi, 379 U.S. 433 (1965), caused this result in this 1966 decision. This confusion evidently lasted to some extent until the Court, when imposing the bar in Harley v. State, 264 So.2d 406 (Miss. 1972), held:

> In the case of Henry v. State, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), the United States Supreme Court stated that:
>
> "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. . . . " 379 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413.
>
> It is clear that objection to the action of the court in appointing persons as bailiffs who are later called as witnesses must be made at the time when the bailiffs are called as witnesses, or if known, at the time when they

they are appointed by the court.

. . .

> We hold that the trial court was correct in dismissing the petition for writ of error coram nobis in this case, because the alleged error was not brought to the attention of the trial court during the trial of the original case.

264 So.2d at 408.

Harley was an appeal from denial of error coram nobis relief in the lower court which puts it into the other category of error coram nobis cases, but the indication is clear that the Court had cleared the doubts in its mind relating to the Henry decision.

Bell v. Watkins, cited by the Court of Appeals as a decision on the merits, simply cannot be called a decision on the merits of every question raised in the application. The opinion in Bell is mainly a chronical of the course of proceedings the case had taken

up to the point of the petition under consideration. The only merits the Court actually spoke to were the claim of newly discovered evidence not available at the time of trial and the claim ineffective assistance of counsel. As noted above these matters are ones generally excepted from the procedural bar. The Mississippi court points out that it is considering only these claims and they are in fact not new claims, but ones presented on prior petitions. The Court stated:

> The petitioner alleges that facts and/or legal issues raised in his complaint in the nature of a petition for writ of error coram nbobis and/or a writ of habeas corpus came to the attention of petitioner after the decision of this Court rendered May 24, 1978. A copy of the complaint is attached hereto as Exhibit "C".
>
> The Court, sitting en banc, has carefully and meticulously considered each allegation of the petitioner's complaint in the nature of a petition for writ of error coram nobis and/or petition for writ of habeas corpus. Some of the allegations have now been considered by the Court in this case no less than four times.

> We have given particular attention to the petitioner's allegations with reference to his claim of inadequacy of counsel, and after a review of the record and trial transcript of this cause, are of the opinion this allegation is particularly lacking in merit for any of the reasons assigned by the petitioner. Trial counsel diligently and able represented the petitioner at every stage of the proceedings.
>
> We are of the opinion that the petitioner, Charles Sylvester Bell, received a fair trial by a jury of his peers in conformity with the laws of the State of Mississippi and the Constitution of the United States; and, the verdict of the jury. and sentence imposed upon his were amply supported and justified by the evidence beyond a reasonable doubt.
>
> 381 So.2d at 119.

The Court considered only the newly discovered evidence claim and the ineffective assistance of counsel claims on the merits. In any event the State did not raise the bar in the defense of this case. What we have in Bell, is a waiver of waiver situation. The State simply waived its

right to rely on the procedural bar in the case by not raising it before the Mississippi Supreme Court. See: Young v. Herring, 777 F.2d at 204; Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). The blame for not imposing the bar against the claims can be laid at the feet of the State in this case not the Mississippi Supreme Court. The Mississippi Supreme Court has imposed the bar when the State relied on that theory to defend the case. This waiver of waiver doctrine was applied by the Court of Appeals in its decision in Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982).

Again in In re Jordan, supra, the State failed to raise the procedural bar as its defense to the claimsand the decision of the Mississippi Supreme Court is clearly on the merits. The waiver of waiver doctrine

applies here also, as the State did not assert the procedural bar before the Mississippi Supreme Court in the post-conviction proceeding. These are the cases that the Mississippi Supreme Court addressed on the merits.

The Court of Appeals cited Culberson v. State, 412 So.2d 1184 (Miss. 1982), as a decision on the merits. 793 F.2d at 625, n. 3. The Court is wrong. The Mississippi Supreme Court's opinion in Culberson does not address the merits. The opinion only states that there is one issue that requires an evidentiary hearing: an ineffective assistance of counsel claim. This fact is borne out by the opinion on appeal from the denial of relief by the trial court. When Culberson filed his petition in the trial court he raised every issue that had been presented to the Mississippi Supreme Court in his application there. The trial court refused to hear them because it found no jurisdiction to do so.

Culberson then raised the refusal to hear the claims on direct appeal from denial of the writ. The Mississippi Supreme Court in Culberson v. State, 456 So.2d 697 (Miss. 1984), held:

> We consider only this assignment of error [ineffective assistance of counsel] for the following reason: Under this Court's order granting permission to file the Petition for Writ of Error Coram Nobis, the court at that time fully considered all reasons for requesting the petition and found that only one question could or should be considered by the trial court under the petition. This was, as herein before stated and as stated in the first assignment of error now before us, that Culberson was allegedly refused permission to testify at his trial.
>
> All of the other assignments of error now presented in this appeal either previously have been disposed of by this Court or all are procedurally barred, except the question granted as to whether or not Culberson was refused permission to testify. A careful study of the opinions heretofore cited confirms these statements.
>
> [Emphasis added] 456 So.2d at 698.

Therefore it is clear that the procedural bar was imposed in Culberson.

The Court of Appeals also relied on Phillips v. State, 421 So.2d 476, 483 (Miss. 1982), as stating that "constitutional defects" will be considered, although not raised on direct appeal. Phillips is a direct appeal from the denial of a writ of error coram nobis in the trial court, putting it in the first category of error coram nobis cases. The language in Phillips is referring to the appellants constitutional claim that a prior Kentucky conviction, relied on to sentence him as an habitual offender, was obtained in violation of Boykin v. Alabama, 395 U.S. 238 (1969). The remedy he had available to him if the Kentucky conviction were voided at some future date was to apply to the Mississippi Supreme Court for leave to file a petition for writ of error coram nobis challenging

the jurisdiction of the court to impose the sentence. Lack of jurisdiction because of a defective indictment can be raised at any time in Mississippi. Echols v. State, 180 So.2d 630 (Miss. 1965). In order to be sentenced as an habitual offender in Mississsippi the indictment must set out two prior convictions. See: Miss. Code Ann. § 99-19-81 (Supp. 1977); Osborne v. State, 404 So.2d 545 (Miss. 1981). Phillips claim on error coram nobis would stand in the position of a newly discovered evidence case.

The section relied on by the Court of Appeals from In re Broom's Petition, 168 So.2d 44, 48 (Miss. 1964), to support its ruling refers to petitions for writ of error coram nobis filed in trial courts where no appeal was ever taken to the Mississippi Supreme Court. This is clearly pointed out in the next paragraph of the opinion, where the Mississippi Supreme Court states:

> In summary, excepting those cases to which coram nobis under section 1992.5 is applicable, a

> prisoner in custody of the state, claiming the right to be released or to a new trial upon the ground that his sentence was imposed in violation of the Constitution of the United States or the State of Mississippi, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence and grant a new trial, or may file a petition of like nature for a writ of error coram nobis for similar relief.
>
> [Emphasis added] 168 So.2d at 48.

The Section 1992.5, referred to in the above quote was the earlier codification of § 99-35-145, Miss. Code Ann. (1972). Broom, set forth the distinction between error coram nobis in the trial court and error coram nobis in the Supreme Court after affirmance on appeal that we have been speaking of, yet the Court of Appeals has ignored the crucial part of the opinion. Appeals from denials of writs of error coram nobis in the trial court have always been

treated differently than those where there has been an appeal and affirmance by the Mississippi Supreme Court. The judgment in those cases that never have been appealed have never been accorded the finality that those having been appealed and affirmed have received. In deciding if the Mississippi Supreme Court has regularly applied the procedural bar in cases similarly situated with that of respondent's we must look to the twenty-eight cases dealing with applications to file petitions for writ of error coram nobis in the lower court filed in the Mississippi Supreme Court. The forty-five (45) other cases dealing with petitions for writs of error coram nobis filed in the trial court and then appealed to the Mississippi Supreme Court that also have written opinions have no application here.

The Court of Appeals cites us to Fondren v. State, 199 So.2d 625 (Miss. 1967), as a case in which the court reached the merits of a claim not assigned as error on direct appeal. A cursory reading of Fondren will clearly show that it is an appeal from denial of a writ of error coram nobis by a trial court. Further it is a case of ineffective assistance of counsel and therefore not one coming under the procedural bar rule. The Mississippi Court states in Fondren:

> The state concedes that there was no waiver of appellant's right to object, since the proof shows that he was not advised of his rights by prior counsel. It should be noted that this question should not arise in future cases provided the trial judge takes the precaution to ascertain at the time of defendant's arraignment whether the defendant is aware of his constitutional right to object to the composition of the grand jury that indicted him and the trial jury that is to try him.
>
> [Emphasis added] 199 So.2d at 626.

The state admitted that Fondren received ineffective assistance of counsel by failure to properly advise him of his rights to

object to the composition of the grand jury. Fondren, stands for nothing here as it is an ineffective assistance of counsel case.

One last area where the Mississippi Supreme Court will entertain the merits of a claim on application for leave to file a petition for writ of error coram nobis is where there has been an intervening decision by the United States Supreme Court that has retroactive application and could invalidate a conviction altogether. In Spears v. State, 278 So.2d 443 (Miss. 1973), the state court considered whether Spears' conviction for abortion should be set aside by the decision in Roe v. Wade, 410 U.S. 113 (1973). No relief was granted. See also: Smith, 434 So.2d at 215.

The benchmark cases in the procedural bar area in Mississippi are Holloway v. State, 261 So.2d 799 (Miss. 1972) and Auman v. State, 285 So.2d 146 (Miss. 1973). Both Holloway and Auman clearly announce the procedural rule that a claim capable of being on direct appeal must be raised then or it is forever waived. Holloway states:

> Obviously, since petitioner referred to himself in his own direct testimony given at his trial, he and his counsel knew of the "show up" or "line up." However, it was never brought to the attention of the trial court, and no question was raised at the trial level that the circumstances had been prejudicially suggestive. Nothing related to it formed any part of the evidence upon which the jury acted in convicting petitioner. There was nothing about it among the several grounds assigned in petitioner's motion for a new trial nor was it assigned or argued as error in petitioner's appeal to this Court. The trial record reflects that petitioner was fairly tried and convicted upon sufficient evidence of guilt.
>
> . . .
>
> Moreover, if there was prejudice resulting from the "show up" or "line up," the facts and circumstances were known to petitioner

> and petitioner's present objection should have been raised at trial. No such proposition was advanced or submitted to the advanced or submitted to the trial court, either as a pretrial matter or in the course of the trial. Nor was it assigned as a ground in petitioner's motion for a new trial. A defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again.
>
> [Emphasis added] 261 So.2d at 800.

In Auman, the Mississippi court, in addressing an issue that was not raised on direct appeal, held, "[a]lthough this issue was not assigned or briefed as error [on direct appeal], due diligence required it to be. 285 So.2d at 147.

One last matter must be addressed and this is the reliance of the Court of Appeals in the Wheat opinion on the decisions by

District Courts in Mississippi in this case [Pruett v. Thigpen, No. EC84-31-LS-D (N.D. Miss. Nov. 21, 1984)] and Edwards v. Thigpen, 595 F.Supp. 1271(S.D. Miss. 1984). The District Court based its decision in the case at bar on Edwards. Wheat is also based on the holding in Edwards. The holding in Edwards is the most flawed of all as it relies on cases that are direct appeals from the original conviction and sentence, not post-conviction cases, to conclude that Mississippi has no legitimate procedural bar. The District Court in Edwards came to the conclusion that the Mississippi Supreme Court applies heightened scrutiny to death penalty cases on direct appeal therefore it excuses all procedural defaults. All of the cases relied on in Edwards emanated from direct appeal and not from post-conviction applications. In Leatherwood v. State, 435 So.2d 645 (Miss. 1983), the Mississippi

Court elabortated upon its scrutiny in death penalty cases stating:

> In cases where we feel that the asserted error has merit and that it unduly prejudiced the appellant, we may raise it as an apparent error on the fact of the record of the Court's own motion. Irving v. State, 361 So.2d 1360, 1363 (Miss. 1978). However, we are not required to do so by court rule or under section 99-19-105 (Supp. 1982) as claimed by the appellant. In this case we are not so persuaded and do not so move. This is consistent with prior holdings where the jury verdict was allowed to stand and similar instructions were approved. Smith v. State, 419 So.2d 563 (Miss. 1982); Voyles v. State, 362 1236 (Miss. 1978); and Bell v. State, 360 So.2d 1206 (Miss. 1978).
>
> 435 So.2d at 650.

It is clear that the "plain error" standard used on direct appeal may not be applied by a Federal Court to post-conviction proceedings. See: United States v. Frady, 456 U.S. 152, 166-67, 102 S.Ct. 1584, 1593-94, 71 L.Ed.2d 816, 829-30 (1982).

The district court in Edwards did not cite, nor could it cite any cases decided by

the Mississippi Supreme court applying the "heightened scrutiny" test in any post-conviction proceeding. To the contrary it is clear from a review of the cases cited above it is beyond question that the Mississippi Supreme Court has consistently applied its conservative scope of review in deciding applications for leave to file coram nobis proceedings in the trial court in death penalty cases.

In holding that Mississippi does not have procedural bars that have to be recognized because it occasionally addresses the merits of a claim that could be waived the Court of Appeals has ignored its own precedent set forth in Henry v. Wainwright; Bass v. Estelle; Gray v. Lucas; and Young v. Herring. In holding that it can reach the merits of the claim in question the Court of Appeals has circumvented the holdings in Wainwright v. Sykes, and Engle v. Isaac. The Mississippi Supreme Court did not announce any new rule in its decision in

Edwards or this case and it had clearly applied the procedural bar in question with regularity prior to the time of respondents direct appeal, taking this case out of the realm of the application of Barr v. Columbia, 378 U.S. 146 (1964) or Hathorn v. Lovorn, 457 U.S. 255 (1982).

2. Certiorari should be granted where the Court of Appeals held that the Respondent's failure to challenge a juror peremptorily when it could did not cure the error in the trial court failing to excuse a juror for cause.

Since the Court of Appeals held that the decision in Wheat, allowed it and the District Court to reach the merits of respondent's claims, the State would address the merits of the claim on which the District Court granted, and the Fifth Circuit affirmed, the grant of the writ of

habeas corpus in this case. The District Court granted respondent's writ of habeas corpus because it concluded the "Ronald Smith was not an indifferent and impartial juror as contemplated by Irvin v. Dowd and its progeny." The rational of the District Court and the Court of Appeals is unsound because they failed to recognize one key fact, respondent affirmatively accepted juror Ronald George Smith. This was done by his refusal to renew his objection to Smith when requested and by stating that he accepted the juror when asked if he wanted to accept the juror or challenge him premptorily. It is true that respondent made a challenge for cause. Thetranscript records the colloquy as follows:

> BY MR. BINDER: All right. Now, a Defendant looks for someone who is impartial. In the case, as the Judge has told you, it is a, you might say, two-type trial. If the Defendant is found guilty, there's another hearing about whether to give him life or the death penalty. That's what all this

talk all afternoon has been about. Now, from what you've read in the newspaper about Mr. Pruett or what you've heard on the T.V., would you--any of you feel uncomfortable if the situation were reversed and you were sitting where he is sitting and he was sitting in judgement on you,if you will, knowing what you have read? Any facts there that might be recalled to your attention if this trial continues that might make you a little biased against him. I want you to search your hearts,--we're in and about serious business--and you tell me if there is something that you read about the facts of this case that will make you a little uncomfortable or a little biased against Mr. Pruett if you sat in judgement on him.

(ONE JUROR RAISED HIS HAND.)

BY MR. BINDER: You have a little bad feeling about it?

BY MR. RONALD GEORGE SMITH: Only just from what I read.

BY THE CLERK: Mr. Smith--

BY MR. BINDER: And did it have a--what you read, did it prejudice you a little against him?

BY MR. SMITH: Just to find out if it's the truth.

BY MR. BINDER: In other words, you're telling the Judge and myself that if we went to trial and you were selected juror on Mr. Pruett's case, the truth of it is that he'd have to put on a little evidence based upon what you've read to kinda prove his worth to you because you've been--you've heard some things against him, haven't you?

BY MR. SMITH: Right.

BY MR. BINDER: And you're just being as honest about it as you know, aren't you?

BY MR. SMITH: Yes sir.

BY MR. BINDER: You know you're under oath?

BY MR. SMITH: Yes, sir.

BY MR. BINDER: All right. And--I'd say that that's one for cause, if the Court please.

BY THE COURT: You may continue, Mr. Binder. I'll rule later on the objections.

[Emphasis added] Tr. 586-87.

The record clearly demonstrates that respondent understood this as he made no more challenges until the end of voir. This

in accord with the preferred practice in Mississippi, which is to wait until all voir dire questions are asked and then to make the challenges out of the presence of the jury. See: Gray v. State, 472 Miss. 409, 421, n. 1 (Miss. 1985). When voir dire was complete, just as the trial court was excusing the jury from the court room, the following colloquy took place between the Court and Mr. Binder. The transcript reads:

> (CONFERENCE AT BENCH BETWEEN COURT AND CONSEL OUT OF HEARING OF JURORS:)
>
> BY MR. BINDER: Your Honor, there's two that's got an opinion that said they would require evidence--
>
> BY THE COURT: I know. And I'll probably sustain your objection, but I'll do it outside of their presence.
>
> BY MR. BINDER: All right.
>
> Tr. 609-610.

When the jury was out of the room the trial court, as required by Mississippi law, had the State exercise its challenges to the prospective jurors. During the State's challenges the interesting twist in this case came about. The State challenged Juror Smith in the following colloquy:

> BY MR. PETERS: The State would challenge Ronald George Smith, Juror No. 1, based upon the fact that he said he would be prejudiced and the Defense would have to put on evidence in order to remove his prejudice from his mind.
>
> BY THE COURT: I didn't interpret his testimony in that regard. He later stated he would not. Go ahead.
>
> BY MR. PETERS: Your Honor, if he did say that, would it be the Court's opinion that he should be excused because I'm quite confident that he said that and I would be willing for the court reporter to--
>
> BY THE COURT: I listened--he was asked if he would be uncomfortable and then he stated that he had read it and it had influenced him, but then he stated that he would be able to set that aside. It will be denied.
>
> Tr. ___

The respondent sat by and said nothing when the above discussion occurred.

When the respondent was ask to state his challenges for cause he challenged Juror Luecke. This challenge was denied and the following colloquy took place:

> BY THE COURT: Denied. Any others for cause?
>
> BY MR. BINDER: No, sir.
>
> Tr. 619

Respondent did not renew his challenge to Juror Smith, nor did he bring to the trial court's attention that his memory was like that of the district attorney. It becomes clear that the respondent had changed his mind, for what ever reason, concerning juror Smith. Although respondent had made a challenge to the juror at the wrong time, the trial court had indicated that it would probably look favorably on the challenge if brought up at the proper time. Respondent chose not to renew his earlier challenge or

make any challenge when given the opportunity at the proper time. Thus the District Court and the Court of Appeals were incorrect when they held that the trial court erroneously refused to allow respondent's challenge for cause against juror Smith. Where is the error? The petitioner did not renew his challenge when he was asked to do so. Therefore was no proper challenge for cause by the respondent.

What compounds the error of the courts below is what occurred when the respondent was asked to exercise his peremptory challenges. The State, as required by law, exercised its peremptory challenges and the following took

place.

> BY MR. PETERS: We tender.
>
> BY THE COURT: Okay. I'll call them out one at a time. Tell me if you accept or challenge. Ron Smith.

BY MR. JORDAN: Accept.

BY THE COURT: That will be Juror No. 1.

[Emphasis added.] Tr. 624-25.

Not only did respondent fail to challenge Ronald Smith for cause he affirmatively accepted him to sit on the jury in this case. Again we ask where is the error?

Respondent persuaded the District Court and now the Court of Appeals to accept his claim that the trial court refused to grant his challenge for cause. That clearly is not the case as there was no challenge for cause at the proper time and there was an affirmative acceptance of Juror Smith by respondent. This fact is on the face of the record, that cannot be changed. Therefore this claim then falls, at the very least, into the exception carved out of the Wheat ruling in the rulings in Johnson v. Thigpen, 623 F.Supp. 1121 (S.D. Miss. 1985)

and Evans v. Thigpen, 631 F.2d 274 (5th Cir. 1986) and in the District Court opinion in this case [A-19], this exception has been approved by the Fifth Circuit in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir., 1986). That exception is where no objection is made at trial or on direct appeal the matter is waived and thus procedurally barred from consideration by the federal courts. Further it has long been the rule in Mississippi, independent of the bar spoken of in Wheat and held not be apply here, that the failure to make a contemporaneous objection at the proper time bars that issue from review on direct appeal. See: Cannaday v. State, 455 So.2d 713 (Miss. 1984). Further, the fact that the State's challenge for cause was not granted cannot be used by the respondent or the courts in support of respondent's claim as the State has never challenged the ruling of the trial court.

Looking to the merits of the claim as an alternative ground we find some interesting language in the record that would justify the trial court's finding that Smith had later stated that he would not require evidence to be put on to "remove his prejudice from his mind." Tr. 592, 600, 607, 609. Although some of these questions were directed at the panel as a whole, Mr. Smith was present and did not indicate that he could not give respondent a fair trial. The test in Passman v. Blackburn, 652 F.2d 559 (5th Cir. 1981) and Murphy v. Florida, 421 U.S. 794 (1975), are met. Smith, by his answers or acquiescence to these subsequent questions demonstrated his ability to lay aside his opinions and therefore the opinion he stated would not form the basis for a challenge for cause.

No matter what the merits of the argument are, respondents would contend that there was no refusal of the challenge for cause as to Juror Smith. Respondent simply did not make his challenge at the proper time. The action of the trial court did not force the petitioner to use a peremptory challenge.. Juror Smith was the first juror seated and he was seated with the words "accept" coming from respondent. Respondent had twelve (12) peremptory challenges at that point in time, he chose not to use one on Juror Smith. He instead affirmatively accepted Juror Ronald George Smith. The District Court and the Court of appeals were in error in holding that respondent was denied a fundamentally fair trial because the trial court did not excuse this juror for cause. The record in this case clearly shows the trial court did not refuse to do so.

Certiorari should be granted as the Court of Appeals refused to impose a legitimate State procedural bar, that being that respondent failed to raise the question of the seating of Juror Ronald George Smith at the proper time.

CONCLUSION

For the above and foregoing reasons petitioners respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

BY: Marvin L. White, Jr.
MARVIN L. WHITE, JR.

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, certify that I have this day caused to be mailed via United States Postal Service, first-class postage prepaid, true and correct copies of the above and foregoing **Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** to the following:

Stephen B. Bright
185 Walton Street, N.W.
Atlanta, GA 30303

Robert E. Morin
Suite 250
414 Hungerford Drive
Rockville, MD 20852

William Sebastian Moore
Post Office Box 1669
Jackson, MS 39205

This the 5th day of February, 1987.

Marvin L. White, Jr.

MARVIN L. WHITE, JR.

86-1302

No. 86-_____

Supreme Court, U.S.
FILED
FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

MORRIS THIGPEN, COMMISSIONER, ET AL.,

PETITIONERS

VERSUS

MARION ALBERT PRUETT

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

EDWIN LLOYD PITTMAN
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STATE OF MISSISSIPPI

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EDITOR'S NOTE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-4236

(D.C. Docket No. EC84-31-LS)

MARION ALBERT PRUETT,

Petitioner-Appellee,
Cross-Appellant,

versus

MORRIS THIGPEN, COMMISSIONER,
Mississippi Department of
Corrections, et al.,

Respondents-Appellants,
Cross-Appellees.

Appeals from the United States
District Court for the Northern
District of Mississippi

(November 7, 1986)

Before CLARK, Chief Judge, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The Commissioner of the Mississippi Department of Corrections, Morris, Thigpen, and others (collectively the "State"), appeal the district court's order granting a writ of habeas corpus to petitioner Marion Albert Pruett, and directing the State to release the petitioner from custody or to retry the petitioner within 120 days. In the Brief of Appellants the State raised only the issue of whether the district court

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

was procedurally barred from hearing the merits of Pruett's habeas corpus petition. The Clerk's office failed to inform this court that it had granted the State an extension of time to file its reply brief. Believing that no reply brief would be filed, the panel issued an opinion based on the initial briefs. When we were advised of the true situation, we withdrew that opinion and granted the State's motion to reconsider the cause. The State has now filed a reply brief and we have considered all points raised in all the briefs and substitute this opinion for the opinion initially issued.

We affirm the district court's order. The recent decision in Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), is binding precedent on the procedural issue. The district court correctly held that Pruett's Sixth Amendment right to an impartial jury

was violated by the trial court's refusal to excuse juror Smith for cause.

I.

In 1982 a Mississippi jury convicted Pruett of capital murder and sentenced him to death. On appeal, the Mississippi Supreme Court affirmed the conviction and sentence. Both Pruett's petition for rehearing by the Mississippi Supreme Court, and his petition for writ of certiorari by the United States Supreme Court were denied. Pruett then filed an application with the Mississippi Supreme Court for Leave to file a Writ of Error Coram Nobis. The Mississippi Supreme Court denied the application on the ground that issues not raised on direct appeal could not be raised in an application for coram nobis relief. Pruett next filed a Petition for a Writ of Habeas Corpus with the United States District court for the Northern District of

Mississippi. The district court granted habeas corpus relief on the ground that the trial court had erroneously seated a juror who had indicated prejudice against Pruett and who therefore should have been excused for cause as requested by both defense counsel and counsel for the State. Because the error occurred in the phase of the trial in which guilt or innocence was determined, the district court ordered the State either to release Pruett or to retry him within 120 days. The State now appeals the grant of a writ of habeas corpus.

II.

The first issue raised by the State is whether the district court was procedurally barred from deciding the issues Pruett presented in his Petition for a Writ of Habeas Corpus due to the Mississippi Supreme Court's decision that issues which could have been but were not raised on direct appeal are forfeited.

The State raised the same question in its appeal of Wheat v. Thigpen, supra. In Wheat, a panel of this court affirmed the district court's determination that prior to Wheat's application for Leave to File a Writ of Error Coram Nobis, the Mississippi Supreme Court had a long-standing practice of considering the merits of issues raised for the first time in such an application. Wheat, 793 F.2d at 625-26. The Mississippi Supreme Court announced a new rule when it denied Wheat's application on the ground that issues which could have been but were not raised on direct appeal were forfeited.

A state procedural rule must be clearly announced to defendant and counsel before it constitutes an independent and adequate state ground that bars a federal court from hearing an issue. Hathorn v. Lovorn, 457 U.S. 255, 262-63, 102 S.Ct. 2421, 2423, 72

L.Ed.2d 824, 832 (1982); Henry v. Mississippi, 379 U.S. 443, 448 n.3, 85 S. St. 564, 567 n.3, 13 L.Ed.2d 408, 413 n.3 (1965). Mississippi's new rule announced after Wheat had completed his direct appeal therefore was not a procedural bar to the federal court hearing his petition for habeas corpus relief. Wheat, 793 F.2d at 627.

As in Wheat, Pruett completed his direct appeal before the Mississippi Supreme Court announced its new procedural rule. This circuit's decision in Wheat controls the procedural issue in this case. Wilson v. Taylor, 658 F.2d 1021, 1034 (5th Cir. 1981); Ford v. United States, 618 F.2d 357, 361 (5th Cir. 1980).

III.

This court does not normally consider issues raised for the first time in a reply brief or petition for rehearing. United States v. Birdsell, 775 F.2d 645, 655 n.4

(5th Cir. 1985); Knighten v. Commissioner of Internal Revenue, 702 F.2d 59, 60 n.1 (5th Cir. 1983), cert. denied, 464 U.S. 897. Appellants are required by our rules to state issues raised on appeal in their Appellant's Brief. FRAP and Fifth Circuit Local Rule 28. To allow issues to be initiated at the reply brief stage would deprive the appellee of the opportunity to respond unless the court permitted a fourth brief for appellee's rejoinder.

In the case at bar, we have received and considered appellee's motion to strike the new portions of the appellant's Reply Brief. We are also cognizant of the clerical error which caused us to proceed before the time extended for the filing of that reply. In these unusual circumstances we have determined to review the new matter raised. Because we find it to be without merit, we need not call for or permit supplemental briefing by appellee.

IV.

On the merits, the State asserts four reasons for reversing the district court's finding that Pruett's right to an impartial jury was violated: (1) the defense did not renew its objection to the juror; (2) the defense did not use a peremptory challenge on juror Smith; (3) juror Smith's failure to repeat his bias during later questioning indicated an ability to lay aside his bias; and (4) juror Smith's statement was not so prejudicial as to deprive Pruett of due process. Finding no merit to these contentions, we affirm the district court.

The issue of juror Smith's bias arose during the following colloquy:

> BY MR. BINDER: All right. Now, a Defendant looks for someone who is impartial. In the case, as the Judge has told you, it is a, you might say, two-type trial. If the Defendant is found guilty, there's another hearing about whether to give him life or the

On the merits, the State asserts four reasons for reversing the district court's finding that Pruett's right to an impartial jury was violated: (1) the defense did not renew its objection to the juror; (2) the defense did not use a peremptory challenge on juror Smith; (3) juror Smith's failure to repeat his bias during later questioning indicated an ability to lay aside his bias; and (4) juror Smith's statement was not so prejudicial as to deprive Pruett of due process. Finding no merit to these contentions, we affirm the district court.

The issue of juror Smith's bias arose during the following colloquy:

> BY MR. BINDER: All right. Now, a Defendant looks for someone who is impartial. In the case, as the Judge has told you, it is a, you might say, two-type trial. If the Defendant is found guilty, there's another hearing about whether to give him life or the

death penalty. That's what all this talk all afternoon has been about. Now, from what you've read in the newspaper about Mr. Pruett or what you've heard on the T.V., would you--any of you feel uncomfortable if the situation were reversed and you were sitting where he is sitting and he was sitting in judgment on you, if you will, knowing what you have read? Any facts there that might be recalled to your attention if this trial continues that might make you a little biased against him. I want you to search your hearts,--we're in and about serious business--and you tell me if there is something that you read about the facts of this case that will make you a little uncomfortable or a little biased against Mr. Pruett if you sat in judgment on him.

(ONE JUROR RAISED HIS HAND.)

BY MR. BINDER: You have a little bad feeling about it?

BY MR. RONALD GEORGE SMITH: One just from what I read.

BY THE CLERK: Mr. Smith--

BY MR. BINDER: And did it have a--what you read, did it prejudice you a little against him?

BY MR. SMITH: Just to find out if it's the truth.

BY MR. BINDER: In other words, you're telling the Judge and myself that if we went to trial and you were selected juror on Mr. Pruett's case, the truth of it is that he'd have to put on a little evidence based upon what you've read to kinda prove his worth to you because you've been--you've heard some things against him, haven't you?

BY MR. SMITH: Right.

BY MR. BINDER: And you're just being as honest about it as you know, aren't you?

BY MR. SMITH: Yes sir.

BY MR. BINDER: You know you're under oath?

BY MR. SMITH: Yes, sir.

BY MR. BINDER: All right. And--I'd say that that's one for cause, if the Court please.

BY THE COURT: You may continue, Mr. Binder. I'll rule later on the objections.

As the judge was excusing the jury, the following occurred:

(CONFERENCE AT BENCH BETWEEN COURT AND COUNSEL OUT OF HEARING OF JURORS:)

BY MR. BINDER: Your Honor, there's two that's got an opinion that said they would require evidence--

BY THE COURT: I know. And I'll probably sustain your objection, but I'll do it outside of their presence.

BY MR. BINDER: All right.

It is clear that defense counsel did object to juror Smith for cause on one occasion and tried to do so a second time. During the jury selection conference in chambers the prosecution objected to juror Smith for cause:

BY MR. PETERS: The State would challenge Ronald George Smith, Juror No. 1, based upon the fact that he said he would be prejudiced and the Defense would have to put on evidence in order to remove his prejudice from his mind.

BY THE COURT: I didn't interpret his testimony in that regard. He later stated he would not. Go ahead.

BY MR. PETERS: Your Honor, if he did say that, would it be the Court's opinion that he should be excused because I'm quite confident that he said that and I would be willing for the court reporter to--

> BY THE COURT: I listened--he was asked if he would be uncomfortable and then he stated that he had read it and it had influenced him, but then he stated that he would be able to set that aside. It will be denied.

The court apparently confused what juror Smith had said with comments by other jurors. There is no indication in the record that juror Smith ever stated he could set aside his prejudice against the defendant.

The State asserts that the defense should have objected again to juror Smith after the conference in chambers. Counsel preserves an issue by bringing it clearly to the trial court's attention and getting a positive ruling. It certainly was not necessary to repeat an objection that had been made by both sides and directly denied by the court.

The State also asserts the defendant should have removed Smith with a peremptory challenge. The defense eventually exhausted all of its peremptory challenges but did not

use one on Smith. The State waived any claim of procedural default on this issue by failing to raise it in the district court. Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981), cert. denied, 456 U.S. 949. In this context, where the juror's bias impairs the defendant's constitutional right to an impartial jury, the defense counsel's failure to use a peremptory challenge does not cure the constitutional defect.[1]

The State's third contention is that juror Smith did not repeat his bias during later questioning. The contention is that this lack of repetition indicates he could lay aside his opinion. The State points out three occasions on which the jurors were

---

[1] The issue remains open whether a defendant who uses a peremptory challenge on a juror who should have been excused for cause, can then obtain habeas relief for violation of the right to the state's statutorily prescribed number of peremptory challenges, a right not explicitly guaranteed by the Constitution. Celestine v. Blackburn, 750 F.2d 353, 360 (5th Cir. 1984).

asked whether they could be fair. These questions were put to the jurors as a group and none of the jurors responded in any way. It would be unreasonable to assume that juror Smith's failure to come forward and repeat his individual response to these group questions would indicate he had changed his mind and could now lay aside his bias. Not even the prosecutor made this assumption.

Juror Smith's lack of response to later questions is far different from cases in which we have held that a juror has shown the ability to overcome his bias by affirmative answers. For example, in Sudds v. Maggio, 696 F.2d 415 (5th Cir. 1983), a juror stated she tended to "lean toward policemen" but later stated she could evaluate the testimony impartially. In Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1975) cited by the State, the Supreme

Court held that a juror's slight indication of prejudice was outweighed by his testimony that he knew nothing about the defendant. 421 U.S. at 802. In this case there is not other direct statement by juror Smith to weigh against his initial indication of prejudice.

The State's fourth contention is that juror Smith did not indicate sufficient bias to deprive Pruett of his right to an impartial jury. The constitutional requirement set out in Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961) is that a defendant must have "a panel of impartial, and indifferent jurors." In Smith v. Phillips, 455 U.S. 209, 217 (1982) the Supreme Court explained that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it." In this case juror Smith stated the defendant would have to put on evidence to overcome what Smith had heard about him.

Passman v. Blackburn, 652 F.2d 559 (5th Cir. 1981) cited by the State is not on point. In Passman the juror stated he believed he would be impartial if the defendant failed to testify. We held the trial court's refusal to excuse that juror for cause was not a denial of fundamental fairness. In contrast to the juror's statement in Passman, juror Smith's affirmative statement was that the defendant would have to put on evidence to prove his worth. Smith's preconceived view of the defendant's innocence deprived Pruett of his right to a trial by impartial jurors.

Conclusion

For the foregoing reasons, we affirm the district court's order. The issues raised in Pruett's cross-appeal are dismissed as moot. The motion to strike is denied.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARION ALBERT PRUETT,

Petitioner,

v. NO.
EC84-31-LS

MORRIS THIGPEN, Commissioner,
Mississippi Department of Corrections,
EDDIE LUCAS, Warden, Mississippi State
Penitentiary, and STATE OF MISSISSIPPI,

Respondents.

MEMORANDUM OPINION

Presently before the court is Marion Albert Pruett's petition for writ of habeas corpus. On November 2, 1981, Marion Albert Pruett was indicted by the Grand Jury of the First Judicial District of Hinds County, Mississippi, for the September 17, 1981, capital murder of Opal H. Lowe, a/k/a Peggy Lowe. Venue was moved to Lowndes County, Mississippi, and in a bifurcated trial, as

required by statute, petitioner was found guilty of the crime of capital murder and sentenced to death. Mr. Pruett perfected a timely appeal to the Mississippi Supreme Court assigning the following as reversible error:

1. The lower court erred in assuming jurisdiction and venue over appellant on the charge of capital murder; in overruling appellant's motion to quash the indictment, directed verdict, and peremptory instruction; and in granting the State's Instruction S-1.

2. The lower court erred in overruling appellant's motion to suppress evidence and admitting confessions into evidence which were illicited from appellant by promises of drugs from authorities.

3. The lower court erred in seating Mr. Sidney Graham (Juror # 8) on the jury and appellant was denied the opportunity to exercise peremptory challenges in an intelligent and knowledgeable manner because of said juror's misstatements during voir dire.

4. The lower court erred in admitting an edited television interview into evidence at the sentencing phase of the trial.

The Mississippi Supreme Court denied relief on February 23, 1983, Pruett v. Thigpen, 431 So.2d 1101 (Miss. 1983). The United States Supreme Court likewise denied Pruett's petition for writ of certiorari. On November 22, 1983, Pruett filed with the Mississippi Supreme Court a petition for writ of error coram nobis. In this petition, Pruett asserted nineteen claims of constitutional error, to-wit:

A. Lack of jurisdiction and constitutional venue.

B. Denial of fair trial due to community prejudice.

C. Failure to excuse for cause a juror prejudiced against petitioner.

D. The death qualification of petitioner's jury.

E. Use of petitioner's involuntary and unconstitutionally obtained statement.

F. Unconstitutional use of unrelated bad acts.

G. Use of inflammatory photographs.

H. Improper closing argument - Guilt-Innocence.

I. Denial of fair trial - Guilt-Innocence.

J. Juror's violation of oath.

K. Consideration of improper aggravating circumstances.

L. Improper limitation of testimony by and cross-examination of mitigating witnesses.

M. Improper instructions and improper jury findings at sentencing.

N. Improper closing argument - sentencing.

O. Denial of fundamentally fair sentencing hearing.

P. Inadequate sentencing report.

Q. Inadequate appellate review.

R. Discriminatory application of the death penalty.

S. Ineffective assistance of counsel.

The state supreme court refused to reach the merits of this petition, relying on petitioner's failure to raise these claims

on direct appeal. Thereafter, Pruett filed his petition for writ of habeas corpus in this court pursuant to 28 U.S.C. § 2254 asserting as grounds for relief the same nineteen claims which he brought before the Mississippi Supreme Court in his petition for error coram nobis review. On November 24, 1984, we denied the state's motion to dismiss this petition on the grounds of procedural forfeiture due to the Mississippi Supreme Court's invocation of a newly constricted scope of error coram nobis review and thereby concluded that for purposes of federal review, petitioner's claims must be considered to have been effectively exhausted as required by statute and decisional law.[1]

---

[1] In our view, prior to its decision in Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983), the Mississippi Supreme Court had addressed with some consistency the merits of death penalty cases on petitions for error coram nobis whether or not said issues had been raised on direct appeal. Edwards announced a new rule wherein claims not raised on

(Footnote 1 Continued)

direct appeal would not be considered on error coram nobis. At the time of petitioner's direct appeal, however, this rule had not been announced. We held that petitioner may have reasonably relied on the then existing "two appeal" procedure by advancing some errors on direct appeal and withholding others for subsequent assertion on error coram nobis, and, therefore, application of the new rule would have unjustly penalized petitioner.

As the state has demonstrated some confusion over the effect of our ruling, we reiterate that it applies only to procedural defaults occasioned as a result of the Mississippi Supreme Court's change in policy regarding coram nobis relief. Our holding does not extend to a default occurring at the trial court level. Thus, this court will, of course, acknowledge procedural defaults which have occurred at trial through the failure to make appropriate contemporaneous objections or requests of the trial judge. See Johnson v. Thigpen, J84-0501(B) (S.D. Miss. Dec. 13, 1985).

I. The Facts.

At trial, the details of this capital offense were revealed substantially through the sworn testimony of petitioner himself. On the morning of September 17, 1981, Marion Albert Pruett entered the branch office of Unifirst Savings & Loan Association for the purpose of committing an armed robbery. During the progress of the armed robbery, petitioner took Peggy Lowe as a hostage in an effort to make his escape. At gunpoint, Mrs. Lowe and the robbery proceeds were taken to Mrs. Lowe's car in which petitioner drove to another area in the Metro Center Shopping Mall parking lot. He then moved Mrs. Lowe into his own car, drove down several adjacent streets, and then to Interstate #20 on which he continued approximately one hundred miles to Sumter County, Alabama, adjacent to the Mississippi - Alabama state line. For the duration of

this ride, Pruett forced Mrs. Lowe to remain on her knees on the floorboard of his car's passenger side with her shoulders, arms, and head downward on the seat. After entering the State of Alabama, Pruett left the interstate highway, drove on a gravel road for a distance, and then onto a lightly traveled dirt road where he stopped. The armed petitioner then led Mrs. Lowe into the surrounding woods where he forced her to disrobe except for her underclothes for the purpose of keeping her under his control and preventing her escape. Pruett then went back to his car, administered a shot of cocaine to himself, and returned to check on his prisoner. He discovered that Mrs. Lowe had moved from the area. He then, by his own sworn testimony, instructed her to get on her knees, put her face down, and repeat her husband's telephone number so that he could be called. Mrs. Lowe was in the

process of complying with these instructions when petitioner shot her in the back of the head at close range. Pruett was apprehended on October 17, 1981, in the area of Stratford, Texas, when Texas state troopers stopped his vehicle for a speeding violation. A routine license check revealed that Marion Albert Pruett was wanted for armed robbery by the State of Mississippi.

II. The Merits.

The scope of habeas corpus review is constricted by the interests of comity and federalism. The purpose of this limited scope of inquiry is to require the defendant to focus on the trial court wherein any and all errors which affect the legality of a conviction should be presented and a record thereon developed. On direct appeal, the state should be given the opportunity to correct the errors of its own courts before these are presented to the federal courts in a habeas proceeding.

This allows the state courts the full opportunity to develop a factual record on matters claimed as error and to correct the error if appropriate. With this basic premise in mind, the court now turns to the merits of Marion Albert Pruett's petition for habeas corpus relief. Having found no need for further evidentiary display, we base our discussion on the record before us.

A. LACK OF JURISDICTION.

Petitioner alleges that the State of Mississippi's assertion of jurisdiction over a crime which was committed in another state violated his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution. It is uncontested that the actual murder of Peggy Lowe took place wholly within the State of Alabama.

Mississippi's assertion of jurisdiction in this action was predicated on Miss. Code

Ann. § 99-11-17 (1972), which provides:

> Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such means or agency proceeded.

Id.

Petitioner was indicted, convicted, and sentenced to death for violating Miss. Code Ann. § 97-3-19(2)(3) which defines capital murder as "the killing of a human being without the authority of law by any means or any manner when done . . . by any person engaged in the commission of rape, burglary, kidnapping. . . . ." A killing is committed during the commission of a felony when there is "no break in the chain of events leading

from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction." Pickle v. State, 345 So. 2d 623 (Miss. 1977) (emphasis added). Under the Mississippi Supreme Court's definition of capital murder, the res gestae of the underlying crime begins where an indictable attempt is made and ends where the chain of events between the attempted crime or completed felony is broken. Id. at 625-26.

Petitioner has argued that the murder was not accomplished during the course of a kidnapping but rather after the abduction had ended. Upon an adequate and carefully developed factual record, the Mississippi Supreme Court determined that, even taking appellant's testimony as true, Pruett never relinquished control over his victim and therefore never abandoned the kidnapping.

Petitioner has offered no new evidence with which to refute the inescapable conclusion that there was "no break in the chain of events leading from the initial felony to the act causing death." Pickle, 345 So.2d at 626.

The crime of capital murder is one discrete offense. Petitioner would have us dissect this offense into two separate crimes in an effort to defeat the jurisdiction of the State of Mississippi. Although there are two distinct components, both of which must be present to sustain a capital murder charge, under Mississippi law, the crime of capital murder was commenced in Hinds County, Mississippi, when Mr. Pruett forcefully abducted Peggy Lowe from her place of employment and was consummated in Alabama when petitioner shot decedent in the back of the head. Thus, Mississippi's criminal venue statute has

been satisfied inasmuch as a crime was commenced in this state which was consummated in another.

Petitioner argues that regardless of Mississippi's interpretation of its laws, the sixth amendment acts as a constraint on a state's wrongful assertion of jurisdiction and concludes that Mississippi's invocation of jurisdiction violates petitioner's right to a trial in the "district wherein the crime shall have been committed." It is axiomatic that "a sovereign has jurisdiction to try an offense where only a part of that offense has been committed within its boundaries." Ford v. U.S., 273 U.S. 593 (1922); Leonard v. U.S., 500 F.2d 673 (5th Cir. 1974). Petitioner claims, however, that double jeopardy concerns serve to limit a state's jurisdiction over a defendant. That Pruett could have been subjected to prosecution in both Mississippi and Alabama under Mississippi's interpretation of its

jurisdictional statute should, according to petitioner, insulate him from prosecution by the State of Mississippi. This double jeopardy argument has been squarely rejected by the United States Supreme Court in Health v. Alabama, 474 U.S. _____, 88 L.Ed.2d 387, 106 S.Ct. _____(1985). In Heath, the defendant hired two men to kill his wife. The two men kidnapped defendant's wife from her home in Alabama and murdered her in Georgia. Defendant pled guilty to "malice" murder in a Georgia trial court in exchange for a life sentence. Subsequently, he was tried and convicted of murder during a kidnapping and was sentenced to death in an Alabama trial court. The Supreme Court held that under the dual sovereignty doctrine, successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause. Consequently, even

if Pruett had been subjected to prosecution in Alabama, such prosecution would not subject him to double jeopardy. The dual sovereignty doctrine provides that when a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct "offenses" for double jeopardy purposes. Heath, 88 L.Ed.2d at 394. Having found no violation of the sixth amendment, Pruett's claim of unconstitutional assertion of jurisdiction must fail.

B. DENIAL OF FAIR TRIAL DUE TO COMMUNITY PREJUDICE.

Petitioner alleges that the failure of the trial court to take steps to minimize overwhelming community prejudice against petitioner after it became apparent that he could not receive a fair trail and sentencing in the county in which the case was tried operated to deny petitioner a fair

trial in violation of his rights guaranteed under the fifth, sixth, eighth, and fourteenth amendments to the Constitution. Prior to trial, defense counsel filed a written motion to change venue asserting that the intense and prejudicial pretrial publicity about the crime and petitioner's other activities would prevent a fair trial. At a hearing on his motion, the state proffered no objection to the change of venue. On February 11, 1982, the trial court, by written order, granted a change of venue and moved the case to Columbus, Lowndes County, Mississippi. Petitioner for the first time in his application for coram nobis relief claimed that he should have been granted another change of venue from Lowndes County. There was no request or suggestion that venue should be changed from Lowndes County at the time of trial. No motion was filed prior to trial nor was an objection interposed at the time the

jury was empanelled. The record clearly reveals complete acquiescence to Lowndes County venue by the petitioner.

It is the Mississippi Supreme Court's firm rule that before an issue may be assigned and argued on appeal, it must first have been presented to the trial court. Where the issue was not timely presented below, it will be deemed waived and thus be procedurally barred. Read v. State, 430 So.2d 832, 838 (Miss. 1983). See also R. 6b, Miss. Supreme Court Rules. A trial judge cannot be put in error on a matter which was not presented to him for decision. Ponder v. State, 335 So.2d 885 (Miss. 1976). It is this court's conclusion that Mr. Pruett has forfeited this claim by virtue of the Mississippi Supreme Court's clearly established contemporaneous objection rule. Having shown no cause or prejudice sufficient to override the effect

of this procedural default, petitioner cannot now complain of constitutional violation. Further, this court is unable to find the first case wherein either the Mississippi Supreme Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court has ever held that a trial court abused its discretion in failing to sua sponte change the venue of a particular proceeding. We submit that for a trial court to do so would be a very risky business indeed.

Petitioner also contends that the failure of the trial court to require individually sequestered voir dire was error of constitutional proportions. The decision of the trial judge on this issue is discretionary, and this court cannot say that the judge's decision not to require individually sequestered voir dire amounts to a clear abuse of discretion.

C. FAILURE TO EXCUSE BIASED JUROR FOR CAUSE.

Petitioner asserts that the trial court's refusal to excuse venireman Ronald Smith for cause violated his rights under the sixth and fourteenth amendments inasmuch as said venireman was prejudiced against Mr. Pruett, thereby depriving Mr. Pruett of an impartial jury. The pertinent portions of the record on voir dire evidence Juror Smith's bias:

> BY MR. BINDER: All right. Now, a Defendant looks for someone who is impartial. In the case, as the Judge has told you, it is a, you might say, two-type trial. If the Defendant is found guilty, there's another hearing about whether to give him life or the death penalty. That's what all this talk all afternoon has been about. Now, from what you've read in the newspaper about Mr. Pruett or what you've heard on the T.V., would you--any of you feel uncomfortable if the situation were reversed and you were sitting where he is sitting and he was sitting in judgement on you, if you will, knowing what you have

read? Any facts there that might be recalled to your attention if this trial continues that might make you a little biased against him. I want you to search your hearts,-- we're in and about serious business--and you tell me if there is something that you read about the facts of this case that will make you a little uncomfortable or a little biased against Mr. Pruett if you sat in judgement on him.

(ONE JUROR RAISED HIS HAND.)

BY MR. BINDER: You have a little bad feeling about it?

BY MR. RONALD GEORGE SMITH: Only just from what I read.

BY THE CLERK: Mr. Smith--

BY MR. BINDER: And did it have a-- what you read, did it prejudice you a little against him?

BY MR. SMITH: Just to find out if it's the truth.

BY MR. BINDER: In other words, you're telling the Judge and myself that if we went to trial

and you were a selected juror on Mr. Pruett's case, the truth of it is that he'd have to put on a little evidence based upon what you've read to kinda prove his worth to you because you've been--you've heard dome things about him, haven't you?

BY MR. SMITH: Right.

BY MR. BINDER: And you're just being as honest about it as you know, aren't you?

BY MR. SMITH: Yes, sir.

R. 586-87.

At the conclusion of the questioning of Ronald George Smith, defense counsel objected for cause. The court reserved a ruling on the objection. During the jury selection conference in chambers, the prosecution objected for cause to Juror R. Smith:

BY MR. PETERS: The State would challenge Ronald George Smith, Juror No. 1, based upon the fact that he said he would be prejudiced and the Defense would have to put on evidence in order to remove his prejudice from his mind.

BY THE COURT: I didn't interpret his testimony in that regard. He later stated he would not. Go ahead.

BY MR. PETERS: Your Honor, if he did say that, would it be the Court's opinion that he should be excused because I'm quite confident that he said that and I would be willing for the court reporter to--

BY THE COURT: I was--I listened-- he was asked-- he was asked if he would be uncomfortable and then he--he stated that he had read it and it had influenced him, but then he stated that he would be able to set that aside. It will be denied.

R. 616.

The state now argues that under 28 U.S.C. § 2254, the question of a challenge to a prospective juror for bias is a "factual issue" and, therefore, a reviewing court must accord the state court's

determination a "presumption of correctness." Summer v. Mata, 449 U.S. 537 (1981). This presumption disappears, however, if the factual determination is not fairly supported by the record. 28 U.S.C. § 2254(d)(8).

The trial court's determination that Juror Ronald Smith would be able to "set aside" his opinion and render an impartial verdict was patently erroneous and clearly not supported by the record. Regrettably, it appears that the state court judge confused the responses of Juror Ronald Smith with those of another. Ronald Smith's final reply to the question, would Mr. Pruett be required "to put on a little evidence based upon what you've read to kinda prove his worth to you" was "Right."

Under Irvin v. Dowd, 366 U.S. 717 (1961), in order to succeed on a claim of juror bias, a habeas petitioner must show the actual existence of an opinion in the mind of the juror as will raise a presumption of partiality:

> It is not required, however, that thejurors be totally ignorant of the facts and issues involved. . . . . To hold that the mere existence of any preconceived notion as to guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impressions or opinions and render a verdict based on the evidence presented in court.

Id. at 722-23.

In the instant case, the conclusion is inescapable that Ronald Smith had formed an opinion as to the petitioner's guilt. There is absolutely no indication in the record that he would have been able to lay aside his opinion and render a verdict based on the in-court evidence. Ronald Smith's response to defense counsel's questioning demonstrated that he would have required

Mr. Pruett to present evidence sufficient to overcome his belief in the defendant's guilt. Clearly, this violates the standard of impartiality contemplated by Irvin v. Dowd. See also Smith v. Phillips, 455 U.S. 209, 217 (1982) (due process means a jury capable and willing to decide the case solely on evidence before it); Murphy v. Florida, 421 U.S. 794 (1975) (same).

The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial and indifferent jurors. The failure to accord an accused a fair hearing violates even the most minimal standards of due process. Irvin v. Dowd, 366 U.S. at 722. The principal way in which this right to trial by indifferent jurors is secured is through the system of challenges exercised during voir dire. In a direct appeal setting, an inhibition of the right to challenge peremptorily or for cause is

deemed reversible error without a showing of actual prejudice. Swain v. Alabama, 380 U.S. 202 (1965), U. S. v. Boyd, 446 F.2d 1267, 1275 n. 27 (5th Cir. 1971). Further, on direct appeal, where refusal to strike for cause was erroneous, such error cannot be cured by the exercise of a peremptory challenge since the effect would be a reduction of the number of peremptory challenges available to a defendant which would result in a substantial impairment of a constitutional right. Boyd, 446 F.2d at 1275. In the direct appeal context, the leading case on this issue is U. S. v. Nell, 526 F.2d 1223 (5th Cir. 1976), which instructs that:

> The jury box is a holy place. To ensure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial. Therefore, as a general rule, it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has

> the effect of abridging the right to exercise peremptory challenges.

Id. at 1229.

The extent to which Nell is applicable to federal habeas proceedings is an issue unresolved in the Fifth Circuit. In Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984), a defendant in a habeas proceeding claimed that he was denied the right to an impartial jury because he was required to use two peremptory challenges against jurors who allegedly should have been excused for cause. The Fifth Circuit concluded that the suspect jurors were not in fact biased. In a footnote, the court stated: "Because we do not find that the trial court abused its discretion under Nell, we do not find it necessary to consider the extent to which Nell is applicable to federal habeas proceedings." Id. at 1275. See also

Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984) (In § 2254 proceedings, the question of whether impairment of right to exercise a full allotment of challenges contravenes sixth amendment right to an impartial jury remains an open one; court found subject juror to be ultimately impartial).

Before proceeding further on this issue, this court must stress the peculiarity of the factual scenario in which the claim herein arises. The trial court judge was mistaken as to the identity of Juror Ronald Smith, an unfortunate but foreseeable consequence of an extended and prolonged voir dire. The prosecution as well as the defendant objected for cause to Juror Smith due to his inability to lay aside his opinion. Although the defendant exhausted all of his available peremptory

challenges in empaneling the jury, at the time of Juror Smith's tender, defense counsel had not utilized any of his challenges.

This court is bothered by defense counsel's failure to utilize one of his peremptory challenges to excuse this juror. We are aware of the line of cases issuing from the Mississippi Supreme Court which hold that the trial court cannot be put in error for failure to properly sustain a challenge for cause if the defendant has not exhausted his peremptory challenges. See, e.g., Capler v. City of Greenville, 207 So.2d 339 (Miss. 1968); Rush v. State, 278 So.2d 456 (Miss. 1973). We note, however, that all of these cases, the defendant's peremptory challenges remained unused at the conclusion of the selection process. Here, Pruett's counsel in the end exhausted all available peremptory challenges. Further, this court finds distinguishing the fact

that in the instant case, although defendant objected for cause during the actual voir dire examination, it was the prosecutor who, during the jury selection conference in the judge's chambers, made the objection to Juror Smith on the basis of bias.

Whether or not this is an appropriate situation for the application of the state's bar is not, however, properly before this court. Although the Mississippi Supreme Court in its denial of error coram nobis review did in fact comment on the merits of many of petitioner's claims, it did not choose to do so in relation to this claim. Although indicating that other of Pruett's claims were barred by the procedural default of failure to raise a contemporaneous objection, the court did not raise counsel's failure to utilize one of his peremptory challenges to excuse Juror Smith as a bar

to review of this claim. Neither did the state at any time raise this contention in either of its two briefs before this court on the habeas petition. This federal court does not now sit as a super state supreme court but, rather, sits only to address issues of constitutional proportion. When the state court does not indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the state by entertaining the claim. Booker v. Wainwright, 703 F.2d 125 (11th Cir. 1983); Sassoon v. Stynchcombe, 654 F.2d 371 (5th Cir. 1981). Further, Fifth Circuit precedent instructs that a state will waive its claim of procedural default by defendant if that issue is not raised at some point in the district court proceedings. Washington v. Watkins, 655 F.2d 1346, 1348 (5th Cir.

1981), cert. denied, 456 U.S. 949 (1982). See also Wiggins v. Procunier, 753 F.2d 1318 (5th Cir. 1985). We have, for previously discussed reasons, considered Mr. Pruett's claims to have been exhausted. The Mississippi Supreme Court failed to raise this procedural default when it addressed the petition for error coram nobis review. Similarly, the state failed to raise this issue in any form at any time during the habeas proceedings before this court. Accordingly, we are constrained to reach the merits of petitioner's claim and therefore proceed to do so.

This court has concluded that Ronald Smith was not an indifferent and impartial juror as contemplated by Irvin v. Dowd and its progeny. Whether or not the participation in jury deliberations of a juror who should have been excused for cause

under the circumstances of this case warrants habeas corpus relief is the issue now before this court.

The Fifth Circuit addressed the consequences of the failure to excuse for cause an allegedly biased juror on a habeas petition in Passman v. Blackburn, 652 F.2d 559 (5th Cir. 1981). Although demonstrating initial bias, the juror subsequently stated that she "believed she could be impartial." The court held that the failure to excuse this juror for cause did not rise to constitutional dimensions. Id. at 567. To warrant habeas relief, the basis for disqualification must be so prejudicial as to deprive the petitioner of due process. In support of this proposition, the Fifth Circuit cited Murphy v. Florida, 421 U.S. 794 (1975), which states that the mere existence of a preconceived notion of guilt without more is insufficient to rebut the presumption of impartiality. As long as the

juror demonstrates an ability to lay aside his opinions, his initial bias cannot form the basis of a challenge for cause. Under the facts sub judice, this crucial ability was not evidenced. In fact, Juror Smith affirmatively stated that petitioner would be required to "prove" something.

The rationale of Passman was followed in Sudds v. Maggio, 696 F.2d 415 (5th Cir. 1983), also a habeas proceeding wherein a challenge for cause was denied. The suspect juror stated that her nephew was a state trooper and that she had a tendency to "lean toward policemen" in matters of testimony. However, again this juror stated that she could evaluate the testimony impartially. The court held that the denial of a challenge for cause did not result in fundamental unfairness, and thus habeas relief was unwarranted. A refusal to grant

a challenge for cause does not provide the basis for habeas relief unless the disqualifying fact was so prejudicial that the refusal deprived petitioner of a fundamentally fair trial.

In both Passman and Sudds, the court concluded that the "disqualifying fact" at issue did not render the respective trials fundamentally unfair inasmuch as the suspect jurors in each case stated that they would be able to lay aside any preconceived opinion and render an impartial verdict. Juror Smith, on the other hand, indicated that petitioner would be required to prove something to him. Due process at a minimum requires that a jury be "capable and willing to decide the issue solely on the evidence before it." Smith v. Phillips, 455 U.S. 209 (1975). It is this court's firm conclusion that the violation of petitioner's due process right rendered his trial fundamentally unfair. See Peters v. Kiff,

407 U.S. 493 (1972) (most minimal due process requires impartial jurors); Rogers v. McMullen, 673 F.2d 1185, 1189 (11th Cir. 1982) (state criminal who can demonstrate that a member of the jury which heard his case was biased is entitled to habeas relief). The participation in jury deliberations over objection from both the defendant and the state of an admittedly biased juror constitutes error of constitutional dimension recognizable in a habeas proceeding.

In compliance with the Fifth Circuit's rule requiring the district court to set forth its findings of fact and conclusions of law upon which its decision to either grant or deny the writ is based, Willie v. Maggio, 737 F.2d 1372, 1377 (5th Cir. 1984), we proceed to analyze the remainder of petitioner's claims.

D. PROSECUTION-PRONE JURY.

Petitioner contends that the jury which convicted him was selected by a procedure

which excluded persons who expressed doubts about imposing the death sentence in any case. This systematic exclusion of this sizeable and distinct group from the guilt - innocence phase of the trial, petitioner asserts, denied him a fair and impartial jury representing a cross-section of the community.

In support of this contention, petitioner cites the Eighth Circuit's decision in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), cert. granted sub nom, Lockhart v. McCree, (Oct. 7, 1985), S. Ct. #84-1865 (Jan. 30, 1985). Grigsby is directly contrary to established Fifth Circuit precedence. See, e.g., Watson v. Blackburn, 756 F.2d 1055 (5th Cir. 1985); Knighton v. Maggio, 740 F.2d 1344 (5th Cir. 1984), cert. denied _____U.S._____, 105 S.Ct. 306 (1984); Sonnier v. Maggio, 720 F.2d 401 (5th Cir. 1983); Spinkellink v.

Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). More importantly, petitioner failed to raise this specific claim at the trial court level and has demonstrated neither cause nor prejudice for the default. For this reason, Pruett's claim must fail.

E. USE OF UNCONSTITUTIONALLY ELICITED STATEMENTS.

Petitioner urges that the admission of his uncounseled statements elicited as a result of improper inducements prior to trial violated his rights under the fifth, sixth, eighth, and fourteenth amendments. Prior to trial, petitioner made a number of incriminating statements about the incident and eventually directed police authorities to the body of the decedent. Petitioner moved to suppress these statements as well

as their fruits and moved to quash the indictment. Within the motion, it was asserted that the inculpatory statements were elicited as a result of improper inducements made by police authorities that if petitioner showed them where decedent's body was, he would be provided with drugs.

During the suppression hearing, Detective O. T. McAlpin testified as follows:

> Q. At the time he made admissions to you and Detective Monroe and Detective Jordan, had you or any other officers extended to Marion Pruett any promise of leniency or hope of reward in exchange for giving such an admission?
>
> A. No sir.

R. 239.

In testimony given subsequent to the instant trial during a suppression hearing in an Arkansas proceeding against Pruett, Detective McAlpin stated: "We agreed not to charge him if he would show us where the body was at." Tr. 579, 580-81, of Cause

No. Cr. 82-226 (Aug. 9, 1982). This contradictory statement was made in August of 1982, three months after the Mississippi trial had concluded.

Any criminal trial use against a defendant of his involuntary statement is a denial of due process of law "even though there is ample evidence aside from the confession to support the conviction." Jackson v. Denno, 378 U.S. 368, 376 (1964). A confession in order to be admissible must be free and voluntary, that is, must "not be obtained by any direct or implied promises, however slight, nor by the execution of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise. . . ." Bram v. U.S., 168 U.S. 532, 542-43 (1897). See also Shotwell Mfg. Co. v. U. S., 371 U.S. 341, 347 (1963). Promises of leniency may constitute coercion

so that statements made in response thereto may be deemed involuntary. Harris v. Beto, 367 F.2d 567 (5th Cir. 1966).

Under Townsend v. Sain, 372 U.S. 293 (1963), an evidentiary hearing in a habeas matter is required where the prisoner's application for habeas corpus contains allegations, not frivolous or incredible, of newly discovered evidence relevant to the constitutionality of his detention.

Petitioner now contends that the statement made by Detective McAlpin in Arkansas constitutes new evidence which would justify a hearing on the issue of whether or not petitioner's confessions were unconstitutional-ly elicited. In the suppression hearing, petitioner alleged only that he was promised drugs in return for divulging to government authorities the location of the body. At no time during the

suppression hearing did the issue of leniency arise. Petitioner never alleged during the proceeding that Detective McAlpin or any law enforcement officer ever indicated to petitioner that his confession would result in the dropping of the Mississippi charges pending. Further, and most persuading is the testimony of petitioner regarding his decision to show officers the location of the body:

> Q: Now what made you decide to tell them where the body was? Did they beat you?
>
> A: No Sir.
>
> Q: Well it was your own decision, wasn't it?
>
> A: Yes sir.

On cross-examination, Mr. Pruett was asked:

> Q: Why did you make that decision? Was it because you wanted to help this family find the body?
>
> A: I made the decision at the end, Mr. Peters, because yes, I wanted the family to be able to bury Mrs. Lowe and give her a

> Christian burial, and her grandchild was fixing to come and she never got to see it and that did weigh heavy on my mind. It overrode the drugs I was wanting.

R. 935. This line of testimony was repeated and expanded. R. 935-939. The Mississippi Supreme Court in deciding the voluntariness issue stated:

> The personal sworn testimony of appellant as the only defense witness in the guilt phase of the trial is inconsistent with his contention in the motion to suppress. He testified that the reason he finally decided to lead officers to Mrs. Lowe's body was so that her family could give her a Christian burial. His testimony was positive that this decision to do this was not based on any promises whatever from anyone.

Pruett v. State, 431 So.2d 1101 (Miss. 1983).

A state court's finding that a defendant's confession was 'voluntary precludes federal habeas relief unless it

can be found that the state record did not fairly support the finding of voluntariness. Casias v. Beto, 459 F.2d 54 (5th Cir. 1972); Gibbs v. Warden of Georgia State Penitentiary, 450 F.Supp. 242 (M.D. Ga., 1978), aff'd, 589 F.2d 1113 (5th Cir. 1979). Both the trial court and the Mississippi Supreme Court found Pruett's confessions to be the product of a free will and rational mind.

Pruett's own testimony at trial provides ample evidence of voluntariness. Further, Pruett never affirmatively stated that the alleged promises of leniency were ever made. He merely reiterated that he was promised cocaine in return for divulging the location of the body. Thus, the "new evidence" is irrelevant. The transcript of the August, 1982, Arkansas proceedings reveals that Detective McAlpin continued to deny that any promises of drugs were ever made to Pruett. This claim is meritless.

F. UNCONSTITUTIONAL USE OF UNRELATED BAD ACTS.

Petitioner asserts that the admission at trial of testimony concerning unrelated criminal activity which was in no way related to the crime for which he was indicted was inflammatory and prejudicial and deprived him of his rights to a fair determination of guilt or innocence in violation of the fifth, eighth, and fourteenth amendments. A summary of the allegedly improper testimony follows:

(a) Special Agent Covington testified that petitioner was indicted on federal charges based on fingerprint results obtained in connection with the state trial. R. 734. Reference was later made to petitioner's efforts to have federal charges consolidated so that he could be sentenced to death in Mississippi. R. 800.

(b) A police officer testified that petitioner admitted serving in federal prison before. Therefore, the officer believed the petitioner understood his rights prior to interrogation. R. 794.

(c) The jurors were told that a particular name was only one of the aliases petitioner used, R. 765, and that his fingerprints were already on file with the Federal Bureau of Investigation before the homicide at issue was committed. R. 729.

(d) A police officer testified that when petitioner was arrested over a month after the offense, he had syringes and other drug paraphernalia in his car. R. 778. Testimony also indicated that property from an unconfirmed California automobile theft was recovered from petitioner's automobile. R. 787.

(e) Petitioner was cross-examined concerning charges on four additional murders in New Mexico, Colorado, and Arkansas, R. 928, five pending bank robbery charges, R. 928, and robbery charges in Seattle, Washington; Tallahassee, Florida; Corpus Christi, Texas; Jackson, Mississippi, and Pittsburg, Pennsylvania. R. 928.

(f) Petitioner was cross-examined about a juvenile adjudication. R. 927.

(g) Petitioner was also cross-examined concerning prior bad acts and propensity for violence:

(1) It was brought out that petitioner had kidnapped people in several previous bank robberies, R. 963, and that he had killed three to four people in other robberies. R. 966-67. Within one month of the homicide in issue, petitioner had been charged with four additional killings. R. 928-29.

(2) Petitioner was also cross-examined concerning his involvement in the Witness Protection Act program and whether he had committed perjury. R. 958.

(3) Concerning petitioner's propensity for violence and threat which he posed to society, during its case in chief, the prosecution introduced testimony that, according to the National Crime Information Center, petitioner was "not [to be] taken alive." R. 786. The witness further stated that a $200,00 cash bail had been set. R. ;786. Later, on cross-examination, petitioner was extensively questioned about whether he intended to remain in jail or instead planned to escape. R. 946.

The cumulative effect of the admission of extrinsic acts in this case is overwhelming and most assuredly prejudicial.

However, the sole objection made to the admission of the above extrinsic acts evidence was to Special Agent Covington's testimony that petitioner was indicted on federal charges. Under Wainwright v. Sykes, 433 U.S. 72 (1977), federal review is precluded if the petitioner failed to preserve his objection at the trial court stage. Mississippi's contemporaneous objection rule is well established and is effective to procedurally bar from review claims arising from errors to which no objections were made. Petitioner complained for the first time on application for petition of error coram nobis that the introduction of bad acts testimony violated his fourteenth amendment rights. In failing to object to the allegedly erroneous admission of the extrinsic acts, petitioner has waived his right to assert this claim absent a showing of cause and prejudice.

Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981). Petitioner has presented no facts upon which a showing of cause can be made.

As to the allegedly erroneous admission of Agent Covington's testimony regarding the federal charges against Pruett to which a timely objection was made, this court is governed by the mandate of Porter v. Estelle, 709 F.2d 944 (5th Cir. 1983), which instructs that the erroneous admission of prejudicial testimony does not justify habeas corpus relief ;unless it is "material in the sense of a crucial, critical highly significant factor," and results in a denial of fundamental fairness. Based on the magnitude of evidence against Mr. Pruett, we cannot conclude that this admission, insignificant when compared to the evidence

offered by petitioner himself, rendered his trial fundamentally unfair. Accordingly, we find this claim to be without merit.

G. USE OF INFLAMMATORY PHOTOGRAPHS.

Petitioner asserts that the admission of photographs of the skeletal remains of the victim constitutes error of constitutional proportion resulting in a fundamentally unfair trial. In reiterating the standard of review of evidentiary matters in a habeas setting, we note that the admission at issue here was not "material in the sense of a crucial, critical, highly significant factor." Porter, 709 F.2d at 557. Upon examination of the subject photographs, we do not find them to be inflammatory, and their introduction into evidence was not so critical as to deny Pruett a fundamentally fair trial, especially considering the overwhelming evidence of guilt introduced by petitioner himself. See Nettles v. Wainwright, 677 F.2d 410, 415 (5th Cir. 1982).

H. IMPROPER CLOSING ARGUMENT AT GUILT-INNOCENCE PHASE.

Petitioner claims that the district attorney's argument was constitutionally improper. Citing numerous examples of alleged prosecutorial misconduct,[2] petitioner asserts that such behavior in a capital trial goes beyond the limits of fundamental fairness. These claims, however, are insulated from review inasmuch as no objection was made at trial to any of the arguments now challenged.

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[2] Petitioner alleges that the prosecutor exacerbated the prejudice created by the introduction of the pictures in his closing argument to the jury by urging the jurors to compare the decedent's appearance when she was living to the photographs of the skeletal remains; by questioning Mr. Pruett's religious beliefs while asserting his own; by asserting that defense counsel regretted his appointment to represent Mr. Pruett and knew Mr. Pruett would be convicted; and by contending that Mr. Pruett should be convicted because of his assertion of his fifth amendment rights during cross-examination.

The Mississippi Supreme Court has consistently held that in order to preserve improper argument for appellate review, a contemporaneous objection must be recorded. See, e.g. Hill v. State, 432 So.2d 427 (Miss. 1983); Coleman v. State, 378 So.2d 640 (Miss. 1979). Having produced no evidence of either cause or prejudice, petitioner's claim is barred by the mandate of Wainwright v. Sykes.

I. DENIAL OF DUE PROCESS-GUILT PHASE.

Petitioner asserts that he was denied a fair trial and fair sentencing hearing because of the cumulative effect of errors heretofore discussed and because of spectator misbehavior.[3]

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[3] In addition to the errors and prosecutorial misconduct otherwise alleged herein, the petition describes the sobbing and crying in the courtroom of spectators and law enforcement personnel, characterizations by witnesses of evidence, and the applause which greeted the verdict of guilty and sentence of death.

For the reasons set out above, we have found all but one of Pruett's claims to be without merit. Consequently, those meritless claims cannot now be relied upon to preface cumulative error of constitutional proportion.

J. VIOLATION OF JUROR'S OATH.

Petitioner alleges that his rights to a reliable sentencing determination and to intelligently utilize his full array of jury challenges were violated when the trial court failed to vacate the sentence of death after it discovered that one of the jurors did not respond in a truthful manner during voir dire. In support of this contention, petitioner points to Juror Graham's statement during voir dire that he would not under any circumstances impose a penalty of death. Consequently, in reliance upon Juror Graham's unambiguous statement, petitioner did not exercise his right to peremptorily

challenge this juror. In fact, petitioner continues, Juror Graham concurred in the sentence of death in direct contradiction to his statement under oath and thereby violated petitioner's constitutional rights.

Suffice it to say that Juror Graham's presence on the jury resulted from the prosecution having confused the identity of veniremen. When the state realized its mistake in selecting Graham, although he was definitely opposed to the death penalty, the prosecutor requested the trial court to allow him to amend his jury striking or permit an alternate to sit in Mr. Graham's place. The court refused this request, stating that the fourteen jurors had already been accepted.

The trial court reasonably concluded that when faced with the facts of this case, the juror simply changed his opinion regarding the implication of the death penalty:

> . . . Juror Graham sat close by appellant when he gave his testimony regarding the details of the robbery, kidnapping, and the other actions toward Mrs. Lowe up to the time he put a bullet in the back of her head. He heard appellant tell of other murders and robberies. He sat closely to appellant during the entire trial observing and seeing a man who would do what appellant admittedly did in this case and would commit other murders as appellant readily admitted during his testimony. How can it now be said then that Juror Graham violated his oath and that because of such a violation, appellant is entitled to a new trial. There is not indication that anything occurred except that the juror changed his mind. There is nothing to indicate duress, undue influence by other jurors, or any other wrong. We find no reversible error here.

Pruett, 431 So.2d at 1107-08.

This court likewise can find no indication whatsoever of duress, undue influence, or fraud. Juror Graham simply changed his mind and in so doing certainly did not violate the constitutional rights of

petitioner. This claim is patently without merit.

K. CONSIDERATION OF IMPROPER AGGRAVATING CIRCUMSTANCES.

Petitioner asserts that his death sentence is unconstitutional because the jury allowed to consider as evidence in aggravation of the crime, matters which were inflammatory and prejudicial and which were wholly unrelated to the statutory aggravating circumstances prescribed by Mississippi's death penalty law, in violation of petitioner's rights guaranteed under the eighth and fourteenth amendments.

During the sentencing phase, the court admitted, over objection, a video taped interview of petitioner filmed when he was first incarcerated in the Jackson city jail. The tape dealt with matters such as petitioner's desire to be executed, R. 1016, 1019-20, whether he would accept counsel, R. 1016, petitioner's drug use, R. 1018, and

his future willingness to commit murders, R. 1017. The tape also contained specific references to advice attorneys had given petitioner concerning the fifth amendment, disclosure of details concerning the homicide, and such declarations as "It's like a war hero once he got the taste of blood, that's what makes him a hero. He can keep killing." R. 1020.

Under Mississippi law, the prosecutor in the sentencing phase is strictly limited to presenting evidence which is relevant to one or more of the aggravating circumstances outlined in MISS. CODE ANN. § 97-19-101(5) (Supp. 1982). See Gray v. Lucas, 677 F.2d 086 (5th Cir. 1982) (Mississippi's construction of death penalty statute allows admission only of evidence which is relevant to enumerated aggravating factors); Coleman v. State, 378 So.2d 640 (Miss. 1979) (same). These aggravating circumstances are:

a) The capital offense was committed by a person under sentence of imprisonment.

b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

c) The defendant knowingly created a great risk of death to many persons.

d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of or attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping....

e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

f) The capital offense was committed for pecuniary gain.

g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

h) The capital offense was especially heinous, atrocious or cruel.

On direct appeal, petitioner asserted that as the taped interview was used along with other evidence to secure a change of venue, it was thereby improper for it to be presented to the jury in the county to which the case was changed. The court found no merit to this contention, stating that:

> A transcription of the question and answers during the taped interview appears in the record and an examination thereof does not begin to compare with appellant's sworn testimony at trial and could not possibly have done him as much harm as his personal testimony before the jury reciting the gory details of his killing of Mrs. Love.

Pruett v. State, 431 So.2d 1101, 1109 (Miss. 1983).

The Supreme Court did not address the question of whether or not the admission of the taped interview violated MISS. CODE ANN. § 99-19-101(5), in that the substance

of the interview did not bear upon any of the enumerated statutory aggravating factors. On a habeas petition, the federal inquiry is somewhat different. In Barclay v. Florida, 463 U.S. 939 (1983), the Supreme Court upheld a death sentence despite the reliance by the trial court on an aggravating circumstance that was improper under state law. The plurality stated that "mere errors of state law are not the concern of this Court," unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution. Id. In Zant v. Stephens, ___ U. S. ____, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Supreme Court held that a death sentence imposed under the Georgia capital punishment scheme is not invalid when imposed partly on the basis of nonstatutory aggravating factor supports the sentence and that the invalid factor itself is not "constitutionally impermissible or totally

irrelevant to the sentencing process." Id.

The court reasoned that:

> Statutory aggravating circumstances play a constitutionally necessary function at the state of legislative definition: They circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selection from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. (Citations omitted.)

Stephens, 77 L.Ed.2d at 251.

In Stephens, although one of the factors considered by the sentencing authority was deemed invalid, the death penalty was nonetheless constitutionally permissible because of the existence of two remaining aggravating circumstances that

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"adequately differentiate[d that] case in an objective, evenhanded and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed. Id.

Thus, a failure of a trial court judge to follow state law in regard to the consideration of aggravating circumstances does not necessarily violate the Constitution. The sentencer, however, must not rely on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as race, religion or political affiliation of the defendant" or "conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." Id. The sentencing authority likewise does not possess discretion to impose the death penalty based on nonstatutory aggravating circumstances which preclude the consideration of mitigating circumstances. Moore v. Balkcom,

716 F.2d 1511 (11th Cir. 1983). See also Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982). The critical question is "whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by [state] statute that it is constitutionally impermissible for the [state] supreme court to let it stand. Barclay, 77 L.Ed.2d at 1134. See Wainwright v. Goode, ___U.S.___, 104 S.Ct. 1017, 78 L.Ed.2d 187 (1983) (even if Court of Appeals was correct in concluding that sentencing judge relied on facts unavailable to him under state law, it erred in reversing district court's dismissal of Goode's habeas petition since balancing of aggravating and mitigating circumstances did not result in arbitrary or freakish imposition of death penalty).

In Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983), the Fifth Circuit, in light of Barclay and Stephens, reversed its prior

decision that it was constitutional error for the sentencing authority to consider nonstatutory aggravating circumstances in determining whether to impose the death penalty. Henry contended that Barclay was inapposite inasmuch as in his case the nonstatutory aggravating evidence was improperly admitted by the trial court. In rejecting this contention, the Fifth Circuit noted that "the court in Barclay did not rely heavily on the coincidence that the evidence was properly admissible under state law," Id. at 993, and concluded that:

> To accept Henry's argument would create an anomaly: The sentencing authority could constitutionally consider nonstatutory aggravating circumstances only if the evidence supporting those circumstances had validly been admitted on some other ground. This result would contradict the clear language in Barclay that "the constitution does not prohibit consideration at the sentencing phase of information not directly related

> to either statutory aggravating or mitigating factors as long as that information is relevant to the character of the defendant or the circumstances of the crime.'

Id. at 994.

Under the facts sub judice, the contents of the taped interview, though most likely irrelevant to prove the existence of a statutory aggravating factor, cannot be said to be irrelevant to petitioner's character or the circumstances of the crime.

Further, the jury cannot be said to have relied upon the information contained in the taped interview, as there existed substantial evidence of statutory aggravating factors. In fact, the jury specifically found the following statutory factors to be present:

1) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

2) The defendant knowingly created a great risk of death to many persons.

3) The capital offense was committed while the defendant was engaged in the commission of or flight after committing kidnapping.

4) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

5) The capital offense was especially heinous, atrocious, or cruel.

Thus, we are provided adequate assurance that Pruett's sentence does not rest with any substantial weight on a nonstatutory factor. See Henry v. Wainwright, 721 F.2d at 994. Accordingly, we find that this claim must fail.

L. IMPROPER LIMITATION OF TESTIMONY BY AND CROSS-EXAMINATION OF MITIGATING WITNESS.

Petitioner asserts that his constitutional rights guaranteed under the eighth and fourteenth amendments were

violated when the trial court improperly limited the testimony of his mitigating witness and thereafter allowed the witness to be improperly cross-examined.

In a long line of cases, the United States Supreme Court has clearly established that:

> The eighth and fourteenth amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers on a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 604 (1976).

Recognizing "that the imposition of death by public authority is ... profoundly different from all other penalties," the plurality in Lockett held that the sentencer must be free to give "independent mitigating weight to aspects of the defendant's

character and record and to circumstances of the offense proffered in mitigation." Id. at 605. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, as a matter of law, refuse to consider any relevant mitigating evidence. The sentencing authority "may determine the weight to be given relevant mitigating evidence. But they may not give it no [sic] weight by excluding such evidence from their consideration." Eddings v. Oklahoma, 455 U.S. 101, 115 (1982). The key inquiry under these cases is relevancy. Where evidence is relevant in mitigation, rules of evidence are relaxed. In Green v. Georgia, 442 U.S. 95 (1979), during the sentencing phase of petitioner's capital murder trial, petitioner sought to elicit testimony from a witness regarding a confession of guilt made to him by a defendant jointly charged with the same

murder. Id. at 96. The state trial court refused to allow this testimony, ruling that it was hearsay and thus inadmissible under the Georgia code. The Supreme Court, vacating the death sentence, stated:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the due process clause of the fourteenth amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial....

Citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the Court concluded that "In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" Id. at 97. Although there is very little law on the question of to what extent rules of evidence are relaxed in the context of mitigation at the sentencing

phase, Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983), reflects the Fifth Circuit's concern over the "federalization" of the law of evidence. In commenting on the Supreme Court's ruling in Green, the Fifth Circuit stated:

> We think that Green is limited to its facts, and certainly did not federalize the law of evidence. It does however indicate that certain egregious evidentiary error may be redressed by the due process clause.

Barefoot at 597. This case certainly does not present such an egregious evidentiary error. The issue here is whether or not the trial court's comments actually had the effect of limiting any relevant mitigating testimony. In context, the judge's ruling merely seems to be an attempt to prevent a drawn out narration as opposed to an exclusion of relevant testimony. In pertinent part, the record reads as follows:

> Q: Tell the court and jury what you saw and found and what the

conversation was you had with Mr. Pruett the first time that you actually saw this convicted murderer here face to face.

A: Well, ever--when I went in, we just--I sat down and just acted myself. I shared part of his life, things that had happened to me before I met the Lord and I had two other people with me and they shared their experiences before they met the Lord and how that God could change his life like he changed our life, you know. And that--you know, some of the things that we went through he'd gone through. It's hard for a prisoner to forgive himself and I was trying to point out to him that there's forgiveness, no matter whatyou've done. You know, like the--the Apostle Paul, he went killing all the Christians and--

Q: That's when his name was Saul, is that right?

A: Yeah, he was Saul and then he was called Paul and so he--the Lord smote him down on the road to Damascus--

> By Mr. Peters: If it please the court, we are going to object to her interpretation of the Bible.
>
> By Mr. Jordan: I'm just asking her what she said to him. How she got--
>
> By the Court: But you can't relate the whole conversation, Mr.--
>
> By Mr. Jordan: Okay.
>
> Q: All right, in summary, would it be succinctly put that you at that time had told him that there was forgiveness and hope for everyone.
>
> A: Right.

R. 1033-1034.

In Edwards v. Thigpen, 595 F.Supp. 1271 (S.D. Miss. 1984), the issue of limitation of mitigation witness testimony on hearsay grounds was presented. The court concluded that:

> Read as a whole, it is clear that the trial judge did not limit the evidence which the defendant could put on in mitigation, but rather was ruling on elementary principles of evidence in not

> allowing a witness to repeat self-serving statements made by the defendant to the witness while the defendant was not under oath or subject to cross examination. The trial judge allowed the priest's testimony about his mental impressions and observations of the defendant....This court finds nothing unfair or limiting in the trial judge's rulings as to evidentiary questions during the sentencing phase.

Id. at 1288.

Likewise, it is clear from the record sub judice that the trial judge did not exclude relevant information. The judge's comment merely cautioned the witness against cumulative and narrative response. The gist of Ms. Gamill's testimony -- that Mr. Pruett was born again and that he no longer wanted to die but rather live to serve the Lord -- was substantially admitted. Consequently, we fail to find error of constitutional dimension in the trial court's limitation of Ms. Gamill's testimony.

M. IMPROPER INSTRUCTIONS AND IMPROPER FINDINGS AT SENTENCING.

Petitioner asserts that the failure of the trial court to properly instruct the jury in its determination of whether the death penalty was appropriate and the jury's failure to make findings regarding aggravating circumstances consistent with the law and constitutional requirements violated petitioner's rights under the fifth, eighth, and fourteenth amendments to the United States Constitution. Petitioner cites the following specific violations:

1. The Instructions Failed to Guide the Discretion of the Jury in Considering Aggravating Circumstances.

Petitioner contends that since the jury was given no definition of the aggravating circumstance that the crime was "heinous, atrocious or cruel," said circumstances was improperly considered by the jury on aggravation. Petitioner failed, however, to

proffer an appropriate instruction defining the terms "heinous, atrocious or cruel" at the trial court level and, therefore, is now precluded from asserting lack of instructional guidance. See Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982); Wheat v. State, 420 So.2d 229 (Miss. 1982); Newell v. State, 308 So.2d 71 (Miss. 1975). No showing of cause or prejudice was made sufficient to overcome this procedural default. Consequently, this claim is barred from federal review.

2. The Failure to Instruct on the "Life Option."

Petitioner asserts that the trial court failed to instruct the jury that it had an option to impose a life sentence without regard to the relative weight of the aggravating and mitigating circumstances. The defendant tendered the following instruction:

> You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment.

Petitioner asserts that by virtue of the trial court's refusal to so charge the jury, the instructions amounted to a mandatory direction to impose a death sentence if mitigating circumstances were outweighed by aggravating circumstances in that the jury was not given the ability to impose a life sentence if it determined that to be the appropriate sentence under all the circumstances.

Federal habeas review of jury instructions is restricted. Singular aspects of the charge may not be viewed in isolation. Cupp v. Naughton, 414 U.S. 141, 146-471 (1973). Instead, the federal court

must examine the charge as a whole to determine the adequacy of the instruction. Davis v. McAllister, 631 F.2d 256, 260 (5th Cir. 1980), cert. denied, 452 U.S. 907 (1981). Furthermore, a deficiency, if found, must have violated some right guaranteed by the Constitution, and it must so infect the entire trial that a resulting conviction or sentence violates due process. Cupp at 146. Instructions, read as a whole, must "channel the sentencer's discretion by clear and objective standards" and "provide specific and detailed guidance." Jordan v. Watkins, 681 F.2d 1083 (5th Cir. 1982). Intrinsic to this channeling is the inclusion of an instruction on the issue of mitigation. Lockett v. Ohio, 458 U.S. 586 (1978); Proffitt v. Florida, 428 U.S. 242 (1978). As a corollary to the mandateof Lockett v.

Ohio, the Fifth Circuit additionally requires that the jury be instructed on the option to recommend against death even if it finds that the aggravating circumstances outweigh the mitigating. See Spivey v. Zant, 661 F.2d 464, 470-71 (5th Cir. 1981); Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978). The charge at issue reads as follows:

JURY INSTRUCTION NO. 14

> You have found the Defendant guilty of the crime of "Capital Murder". You must now decide whether the Defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circum-stances of the offense for which the Defendant was convicted, and the Defendant himself.
>
> To return the death penalty, you must unanimimously find from the evidence, beyond a reasonable doubt, that aggravating circumstances - those which tend to justify the death penalty - outweigh mitigating circumstances - those which tend to justify the penalty of life imprisonment.

If you unanimously find from the evidence in this case, beyond a reasonable doubt, any of the following aggravating circumstances:

1. The Defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

2. The Defendant knowingly created a great risk of death to many persons.

3. The capital offense was committed while the Defendant was engaged in the commission of or flight after committing kidnapping.

4. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

5. The Capital offense was committed for pecuniary gain.

6. The capital offense was especially heinous, atrocious or cruel.

The mitigating circumstances which you may consider include the following:

1. The offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. The age of the Defendant at the time of the crime.

4. Any and all other matters, facts and circumstances which you as jurors may consider from the evidence as mitigating.

5. Any circumstances or combination of circumstances surrounding the Defendant's life and character or the offense itself which reasonably mitigates against imposition of the death penalty.

If you unanimously find from the evidence, beyond a reasonable doubt, any one or more of the aggravating circumstances listed above, and, if after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

"We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances: (list the aggravating circumstances, if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are

listed.) We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death."

_____

Foreman of the Jury

If you fail to find any aggravating circumstances unanimously and beyond a reasonable doubt, or if you find unanimously and beyond a reasonable doubt one or more aggravating circumstances, but after weighting the aggravating and mitigating circumstances, one

> against the other, you fail to unanimously find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances, then you verdict shall be in the following form: . . . .

This same jury instruction was challenged for failure to instruct on the life option in Edwards v. Thigpen, 575 F.Supp. 1271 (S. D. Miss. 1984). The court found that:

> The jury was given three choices by this instruction. It could find that the aggravating circumstances outweighed the mitigating circumstances, that the mitigating outweighed the aggravating circumstances or that they were unable to reach a concensus. Under the second two alternatives, a life sentence would be imposed. The wording of the first alternative includes the additional phrase "and that the death penalty should be imposed" which gave the jury an option of imposing the death

> penalty or of granting mercy even if the aggravating circumstances outweighed those which mitigated if they felt the death penalty was inappropriate.

Id. at 1286.

We agree with the Edwards court and further emphasize that the placement of the word "and" requires that the jury make an additional finding that the death sentence is appropriate after they have determined that the aggravating factors outweigh the mitigating. We cannot conclude that this instruction, taken as a whole, amounted to a mandatory direction to impose a death sentence if the mitigating circumstances were outweighed by the aggravating. For this reasons, we find no violation of the principle enunciated in Spivey v. Zant. Further, this court finds no basis for requiring the jury to specifically be instructed that they may ignore the balancing of aggravating and mitigating circumstances and vote for life imprisonment based on a decision to be merciful.

3. Failure to Instruct the Jury that it Must Find Beyond a Reasonable Doubt That the Aggravating Circumstances Outweigh the Mitigating Circumstances.

Petitioner's claim hereunder of constitutional infraction is patently meritless. Although Mississippi requires that jurors find the existence of each aggravating circumstance beyond a reasonable doubt, the jury may return the death penalty if the aggravating circumstances are not outweighed by the mitigating circumstances. The actual weighing process is left to the jury's discretion. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982). This allocation of proof accords with the constitutional requirements of capital sentencing procedures. See Greg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Fla, 428 U.S. 242 (1976). Specific standards for balancing aggravating against mitigating circumstances are not constitutionally required in narrowing the categories of murders for which a death sentence may be imposed. Zant v. Stephens, __ U.S. ____, 103 S.Ct. 2733,

77 L.Ed.2d 235 (1983). Furthermore, the jury was in fact instructed, albeit incorrectly to petitioner's benefit, that it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances in order to reach a verdict of death. Petitioner's claim is, therefore, specious on its face.

4. Failure to Adequately Define Nature and Function of Mitigating Circumstances.

Petitioner asserts that the trial court's instructions were constitutionally inadequate in that they failed to instruct the jury on the full nature and function of mitigating circumstances in determining whether mercy is appropriate. Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), mandates that jury instructions "describe the nature and function of mitigating circumstances which, although not justifying or excusing the offense, may properly be considered in

determining whether to impose the death sentence." Id. at 472 The Spivey directive requires the court to tell the jury what a mitigating circumstance is and what its function is in the jury's deliberations. See also Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983); Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978).

Petitioner offered the following instruction:

> The court instructs the jury that mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

This instruction was taken verbatim from Spivey v. Zant. However, mindful of our duty to construe the jury instructions as a whole, we conclude that the charge taken in its entirety properly apprises the jury of the nature and function of mitigating circumstances.

Although the trial court's definition of mitigating circumstances as "those which

tend to justify the penalty of life imprisonment" falls short of the Spivey explanation, the trial court herein further provided that the following circumstances may have been considered in mitigation:

(1) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(3) The age of the defendant at the time of the crime.

(4) Any and all other matters, facts, and circumstances which you as jurors may consider from the evidence as mitigating.

(5) Any circumstance or combination of circumstances surrounding the defendant's lifeand character or the offense itself which reasonable mitigates against imposition of the death penalty.

Thus, by illustration, the trial court supplemented its original definition of mitigating circumstances. This court cannot conclude that the dictates of Spivey v. Zanthave been violated.

5. The Use of Duplicate Aggravating Circumstances Emanating From the Same Set of Facts Impermissibly Skewed the Sentencing Proceeding in Favor ofDeath.

Petitioner claims that since the jury was instructed that it could find as separate aggravating circumstances that the defendant committed the offense while in "flight after committing kidnapping" and that the offense was committed "for the purpose of avoiding or preventing a lawful arrest, he was required to overcome the weight of two aggravating circumstances instead of one inasmuch as both circumstances covered the same aspect of petitioner's crime.

In returning a sentence of death, the jury found the presence of five aggravating circumstances:

(1) The defendant was previously convicted of another capital offense or of a felony invoking the use or threat of violence to the person.

(2) The defendant knowingly created a great risk of death to many persons.

(3) The capital offense was committed while the defendant was engaged in the commission of or flight after committing kidnapping.

(4) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

(5) The capital offense was especially heinous, atrocious, or cruel.

This court cannot imagine that the elimination of one of the aggravating circumstances would have made any difference to this jury. Nevertheless, the fact that

the statute allows the finding of two statutory aggravating circumstances based on the single set of facts presented by this case does not violence to the requirements of the eighth amendment. The instructions concerning aggravation and mitigation comported with constitutional requirements. See Zant v. Stephens, 77 L.Ed.2d 235 (1983). The aggravating circumstances found in this case operated to properly narrow the class of persons eligible for the death penalty. The imposition of the death under these circumstances did not create a substantial risk of infliction in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153, 188 (1976). This claim must fail.

6. The Refusal to Instruct the Jury That it Could Not Act in Reliance on the Granting of Clemency or Leniency.

The trial court refused petitioner's proposed instruction informing the jury that it could not decide punishment in reliance on the granting of clemency or leniency. While such instructions may be permissible under the Constitution, they are not mandated thereby. California v. Ramos, 463 U.S. 992 (1983); O'Bryan v. Estelle, 714 F.2d 365, 388-89 5th Cir. 1983). The substantive limitations imposed upon the capital sentencing process concern the prevention of arbitrary and "freakish" jury action. The "leniency" instruction does not implicate such substantive limitations and, therefore, the states remain free to determine whether or not such instruction should be given. Ramos, 463 U.S. at 1013. Mississippi has determined, along with a number of other states, that jury consideration of such matters is improper. See Bullock v. State, 391 So.2d 601, 610 (Miss. 1980). Thus, petitioner's claim presents no constitutional infraction and no ground for federal habeas relief.

N. IMPROPER CLOSING ARGUMENT - SENTENCING PHASE.

Petitioner asserts that the pronounced and persistent misconduct by the prosecutor during closing argument at the sentencing phase of the trial violated petitioner's rights guaranteed by the fifth, eighth, and fourteenth amendments to the Constitution.

Although petitioner cites numerous instances of alleged misconduct,[4] only one objection was made to the substance of the argument. In order to preserve such a claim for appellant review, the Mississippi Supreme Court requires that a contempora-

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[4] Petitioner lists a catalog of prosecutorial misbehavior. The following is an attempted summarization: (1) attempting to persuade the jury that it was their religious and patriotic duty to sentence petitioner to death; (2) suggesting that if a life sentence were imposed, petitioner would be free to kill again; (3) suggesting that the jurors would be saving money if they executed the petitioner; (4) suggesting that if given the opportunity, petitioner would kill his attorney; (5) inflaming the passion of the jury by suggesting that they were accountable to the decedent's family.

contemporaneous objection be made to the offensive matter at trial. See, e.g., Hill v. State, 432 So.3d 427 (Miss. 1983); Coleman v. State, 378 So.2d 640 (Miss. 1979). Having failed in this regard, and absent a showing of cause and prejudice, petitioner can only rely upon the one instance in which an objection was interposed to alleged misconduct in support of his claim. The subject portion of the prosecutor's argument reads as follows:

> By Mr. Peters: Right over there is a Christian family, and Mr. Binder says it won't do a bit of good for Marion Albert Pruett to get the death penalty. Over there is the wife of a child whose mother never saw that child because of Marion Albert Pruett. You tell me it won't do some good for them to hear what happened to the man that saw that she would never, ever in her life see her first

> grandchild. Ever. You didn't do it. You're not the blame. You're not the reason he'll get the penalty he deserves. He is. Don't let them pin it on you. Don't let them tell you "Oh you're an executioner and you did not good." Talk to them. When you come out, tell them. "I just didn't think her death deserved the punishment they were seeking." You tell that little girl that was up there on the stand, the daughter, "Sugar, your-- your mother's death didn't matter enough to me to vote for the death penalty. I don't care whether she even got to see her granddaughter or not." . . .
>
> By Mr. Jordan: We object to this, we let it go on, but it's highly prejudicial.
>
> By the Court: Overruled.

In reviewing the propriety of a prosecutor's comments made during a state trial, we apply the same basic standard used in in reviewing a state court's evidentiary rulings. A state court conviction or sentence may be overturned only if the alleged error rendered the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974); Mattheson v. King, 751 F.2d 1432, 1445-46 (5th Cir. 1985). It is our conclusion that the prosecutor's remarks, although unsavory,

did not render the sentencing phase of the trial fundamentally unfair. Viewing the argument together with the evidence against petitioner, we conclude that the jury's recommendation of death was not influenced by improper comments. The jury found five aggravating factors, and there was little mitigating evidence presented. See Willie v. Maggio, 737 F.2d 1372, 1391 (5th Cir. 1984); see also Bronstein v. Wainwright, 646 F.2d 1048, 1056 (5th Cir. 1981) (weak case against defendant will cause prosecutor's improper comments to assume greater significance); Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir.) ("statement complained of did not rise to level of a denial of due process when considered in light of evidence against appellant"). For these reasons, petitioner has failed to state a claim of constitutional significance.

O. DENIAL OF FUNDAMENTALLY FAIR SENTENCING HEARING.

Petitioner incorporates by reference claims A-N and asserts that the cumulative effect of these alleged errors operated to deny him a fair sentencing hearing. As previously stated, we have found all but one of Pruett's claims to be without merit. Consequently, those meritless claims cannot now be relied upon to preface cumulative error of constitutional proportion.

P. UNRELIABLE SENTENCING REPORT.

Petitioner asserts that the sentencing report prepared by the trial judge pursuant to Miss. Code Ann. §99-19-105(c) was inaccurate and misleading, and for this reason, the Mississippi Supreme Court's reliance on this report rendered its review of the sentence constitutionally inadequate. The United States Supreme

Court's decision in Gardner v. Florida, 430 U.S. 360, requires that ". . . the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." The sentencing report at issue complies with this directive. The trial judge noted the five aggravating factors found by the jury and summarized the evidence at trial upon which they were predicated. The considerations which motivated the death sentence were thus properly disclosed. There was no error of constitutional magnitude.

Q. INADEQUATE APPELLATE REVIEW.

Petitioner argues that the Mississippi Supreme Court failed to conduct the meaningful appellate review of his sentence that the United States Supreme Court has found to be a safeguard against arbitrary application of the death penalty. See

Pulley v. Harris, __U.S.__, 104 S.Ct. 871, 79 L.Ed.2d 26 (1984). In support of this contention, Pruett states that the court improperly reviewed the trial court's application of the aggravating circumstance that the crime was "especially heinous, atrocious or cruel." As previously discussed, petitioner failed to object to the applicability of this particular circumstance at trial and thereby forfeited his right to assert this claim on appeal. Secondly, Pruett contends that review was inadequate inasmuch as the court allowed the sentencing jury to "double up" aggravating circumstances. We have already disposed of the substance of this claim under subheading M(5) of this opinion. Petitionerfinally argues that he was denied his right to an adequate proportionality review of his sentence. This claim has been fore-
closed by the United States Supreme Court's

holding in Pulley v. Harris, ___ U.S.___, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). We consequently find no error of constitutional proportion concerning the appellate review conducted by the Mississippi Supreme Court.

R. DISCRIMINATORY APPLICATION OF THE DEATH PENALTY.

Petitioner contends that his death sentence was imposed pursuant to a discriminatory pattern and practice in violation of his rights guaranteed under the eight and fourteenth amendments of the United States Constitution. The death penalty in Mississippi, Pruett argues, is discriminatorily applied against defendants who are poor, who are accused of killing caucasions, and who are black. Mr. Pruett has, however, forfeited this claim inasmuch as it was not presented to the trial court by motion subsequent to the sentencing phase or motion for a new trial. Having failed to show cause and prejudice, the doctrine of

Wainwright v. Sykes precludes federal review.[5]

S. INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner alleges that he was deprived of his sixth and fourteenth amendment rights to effective assistance of counsel and cites no less than twenty-seven instances of deficient performance.[6] Accompanying this list is an affidavit from petitioner's

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5 We are inclined to agree with the Mississippi Supreme Court's pronouncement of this claim as "ridiculous" in its denial of error coram nobis relief.

Marion Albert Pruett is white, and the statistical study now proffered, an unpublished manuscript entitled "Capital Sentencing in Mississippi," condemns the Mississippi sentencing structure because of its discrimination against blacks.

6 Pruett alleges in his Petition for Writ of Habeas Corpus that:

But for counsel's constitutionally ineffective assistance, the trial would not have included testimony concerning other crimes, including murder, with which petitioner had

(Footnote 6 continued)

not been yet tried, much less convicted. Nor would the trial have included testimony concerning untried criminal charges in seven other jurisdictions or the fact that petitioner was considered dangerous and not to be taken alive.

But for counsel's constitutionally ineffective assistance, evidence concering petitioner's past and future propensity for violence would not have been admitted. Nor would the prosecution have been permitted to confront petitioner's character with that of the deceased's and to ultimately urge jurors to sentence petitioner to die out of a sense of obligation to the deceased's family and other crime victims, past and future. Moreover, had petitioner been previously advised and known that he would be questioned by both defense counsel and the prosecution about other criminal matters, he would not have testified on his own behalf.

(Footnote 6 continued)

But for counsel's failure to limit prejudicial evidence or object to inflammatory argument, petitioner's jury would have been able to weigh mitigating and aggravating circumstances in a setting consistent with reasoned elaboration and the requirements of the sixth and fourteenth amendments.

But for counsel's failure to investigate the impact of narcotics on petitioner's conduct, and counsel's failure to obtain expert testimony, the jury would have learned of substantial evidenced in mitigation of the death penalty.

If the preceding had not been distorted by irrelevant and prejudicial evidence regarding petitioner's character, prior bad acts and pending charges, a different sentencing decision could have been reached.

Had exculpatory evidence pertaining to petitioner's mental state been presented, a different balancing of ggravating and mitigating circumstances would have resulted, thereby yielding a different outcome at the sentencing phase.

affidavit from petitioner's co-counsel reciting that lead counsel's assistance was rendered ineffective when he asked petitioner on direct examination if there were any "charges" pending against him. Having inquired into charges rather than convictions, testimony was elicited concerning the pendency of several armed that "he (petitioner) said many things today without advice from counsel. He acts as his own counsel most of the time in certain areas." R. 1095.

Faretta v. Calif., 422 U.S. 806 (1975), instructs that "whatever else may or may not be open to him on appeal, a defendant who elects to do so. R. 4-16. The trial court fully advised petitioner of his right to have appointed counsel. Petitioner insisted on representing himself as his own attorney but robbery and three murder charges against Pruett. Whether or not this error alone or when coupled with the other alleged

deficiencies suffices to render counsel ineffective is, however, irrelevant. We conclude, as did the state supreme court on its denial of error coram nobis review, that Pruett acted as his own counsel. That Pruett's appointed "legal advisors" participated fully in his defense is insufficient to negate petitioner's repeated insistence throughout the record that he acted as his own attorney.

Prior to indictment, the trial judge questioned Pruett extensively regarding his desire to represent himself and his abilityargument, the leading "legal advisor" stated requested that "legal advisors" be appointed to assist him. He stated that he had successfully represented himself in the past, had done legal research while incarcerated, and was thoroughly familiar with the manner in which his defense should be conducted. When petitioner took the stand, he was again specifically asked, "You

are your own attorney, are you not?", and he answered, "Yes sir, I am." R. 931. On final to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." Id. at 834, n. 46. The record herein demonstrates that petitioner knowingly waived his right to counsel and was made fully aware of the perils of self-representation. The trial court appointed two legal advisors at Pruett's request. Petitioner may not now complain that his advisors ineffectively "co-represented" him and denied him a fair trial. Pruett's claim of effective assistance of counsel must fail.

III. Conclusion.

We have found petitioner's claim of juror bias (claim C) to warrant habeas corpus relief inasmuch as the trial court's failure to excuse juror Ronald Smith for cause resulted in a denial of petitioner's sixth amendment right to an impartial jury. We have examined and discussed the remainder of Pruett's claims and find them all to be without merit. As the claim of juror bias requires relief, it is the court's solemn duty to grant the writ of habeas corpus directing that the State of Mississippi release the petitioner from custody pursuant to the aforesaid conviction unless the state elects to retry petitioner on such charge within 120 days from the date herein.

An order in conformity with this opinion shall issue.

This 21st day of March, 1986.

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARION ALBERT PRUETT — PETITIONER

VS. — NO. EC 84-31-LS-D

MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EDDIE LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, AND STATE OF MISSISSIPPI, — RESPONDENTS

MEMORANDUM ORDER

This matter comes before the court on respondents' motion to dismiss the petition of Marion Albert Pruett for writ of habeas corpus. Respondents argue that since petitioner's claims were barred on coram nobis review in state court, this procedural default prevents federal review of the merits under Wainwright v. Sykes, 433 U.S. 72 (1977). Petitioner contends that because of its strategic purpose and inconsistent application,

the procedural bar advanced by respondents cannot serve to preclude consideration of petitioner's claims. This court having reviewed the memoranda of the parties must conclude that a procedural bar recently created and retroactively applied cannot be considered "adequate" to bar federal review under the Sykes standard.

Federal courts have the fundamental responsibility of protecting constitutional rights unless the state court has invoked a "true" procedural bar, one supported by independent and adequate state grounds and one fairly applied to all litigants. In Hathorn v. Lovorn, 457 U.S. 255 (1982), respondents asserted that petitioner's claims were procedurally barred as the Mississippi Supreme Court will not consider an issue raised for the

first time in a petition for rehearing. The Supreme Court found that although this may have been the Mississippi court's practice prior to 1969, that court's more recent custom has been to grant petitions for rehearing without mentioning any restrictions. In holding that the Mississippi Supreme Court's treatment of issues on petitions for rehearing was so irregular that federal review could not be barred, the Court stated:

> We have recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question. Our decisions, however, stress that a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766 (1964). State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply even handedly to all similar claims. Even if we construe the

Mississippi Supreme Court's denial of petitioner's petition for rehearing as the silent application of a procedural bar, we cannot conclude that the state court consistently relies upon this rule.

A state procedural rule must be "clearly announced to the defendant and his counsel." Henry v. Mississippi, 411 U.S. 258 (1958). Only a procedural bar in force at the time of trial or direct appeal will be honored under principles of comity. See granviel v. Estelle, 655 F.2d 673, 679 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) ("we cannot enforce against Granviel, a contemporaneous objection rule that did not even exist at the time of his trial.); Lumpkin v. Ricketts. 551 F.2d 680 (5th Cir. 1977), cert. denied, 434 U.S. 957 (applying state law in force at time of trial).

An analysis of the Mississippi Supreme Court's review of applications for coram nobis

relief[1] indicates that the court has erected

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[1] See, e.g., Phillips v. State, 421 So. 2d 476, 483 (Miss. 1982) (writ of error coram nobis available to one mounting collateral attack based upon constitutional defects in a conviction); Nelson v. Tullos, 323 So.2d 539 (Miss. 1975) (relief for defendant convicted in violation of constitutional rights is by writ of error coram nobis); Clayton v. State, 254 So.2d 874, 875 (Miss. 1971) (same); Love v. State, 221 So.2d 92, 94 (Miss. 1969) ("even most hardened criminals not denied a 'full-blown' hearing" when applying for post-conviction relief by writ of error coram nobis); Fondren v. State, 199 So. 2d 625 (Miss. 1967) (even though issue not timely raised at trial, coram nobis review properly utilized to reach merits and grant relief); Windom v. State, 192 So.2d 689, 691 (Miss. 1966) (coram nobis review provides post-conviction remedy for adjudication of all issues that may be raised under the constitution); Smith v. State, 155 So. 2d 494, 495 (Miss. 1963) (same).

procedural bars only in recent months in a marked departure from traditional treatment. Prior to this departure, in capital cases the Mississippi Supreme Court routinely addressed the merits of all claims raised for the first time on petition for writ of coram nobis. See Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983); Bell v. Watkins, 692 F.2d 999, 1006 (5th Cir. 1982); Jordan v. Watkins, 681 F.2d 1067, reh'g denied, 688 F.2d 395 (5th Cir. 1982); Washington v. Watkins, 655 F.2d 1346, 1368, reh'g denied, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); Jones v. Thigpen, 555 F.Supp. 870, 873 (S.D. Miss. 1983); Voyles v. Watkins, 489 F.Supp. 901, 912 n. 7 (N.D. Miss. 1980); Culberson v. State, 412 So.2d 1184 (Miss. 1982); Bell v. Watkins, 381

So.2d 118, 119 (Miss. 1980). In 1983, the Mississippi Supreme Court, in sharply divided opinions, described a new restrictive scope of coram nobis review. See King v. Thigpen, 441 So.2d 1365 (Miss. 1983) (issues not alleged as error on direct appeal could not be raised for first time on petition for writ of error coram nobis.); In re Evans, No. 53,754, slip op. (Miss., Nov. 30, 1983) (same); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983) (same); Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983) (same).

Petitioner Marion Albert Pruett filed his direct appeal to the Mississippi Supreme Court on June 3, 1982. As of this date, the court had not yet enunciated the present rule regarding the constricted scope of coram nobis review. It may be assumed that petitioner relied on the fact that any additional assertions of error not included in his direct appeal could have been brought before and

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properly reviewed by the Mississippi Supreme Court as was the practice at that time regarding coram nobis review. Thus, the Mississippi Supreme Court created:

> a situation where a state court has followed a regular past practice of entertaining claims in a procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar . . . . [A] procedural requirement has been sprung upon any unwary litigant when prior practice did not give him fair notice of its existence.

Walker v. City of Birmingham, 388 U.S. 307, 319 (1967) (citing Barr v. City of Columbia, 378 U.S. 146 (1964)).

On petition for habeas review, in the case of Edwards v. Thigpen, supra, District Judge William C. Barbour held that "the procedural bar invoked by the Mississippi Supreme Court on Edwards' petition for a writ of error coram nobis did not constitute an independent and adequate state ground such as to bar review of

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those claims by the federal court on habeas corpus." The court reasoned that retroactive application of such a procedural rule, nonexistent at the time of direct appeal, placed the petitioner in the untenable position of forfeiting possible assignments of error because of his reliance on the coram nobis proceedings to allow exhaustion. Edwards v. Thigpen, No. J83-0566 (B), slip op. at 11-13 (S.D. Miss. Sept. 14, 1984).

This court similarly refuses to insulate the petitioner's constitutional claims from federal review where said petitioner had no notice of the fact that any additional claims would be forever lost if not asserted on direct appeal.

The state argues that seventeen of petitioner's nineteen claims are procedurally

barred. It is this court's determination that the nineteen assignments of error raised in the petition for writ of error coram nobis have effectively been exhausted as required by statute and are to be considered by this court on the merits.

Accordingly, IT IS ORDERED:

That State's motion to dismiss the petition for writ of habeas corpus be and is hereby denied;

That State submit within thirty (30) days of the date herein its memorandum of authorities addressing the substantive merits of petitioner's nineteen grounds for review;

That petitioner have fifteen (15) days from the date of receipt of the State's memorandum to file a rebuttal memorandum.

This 21st day of November, 1984.

CHIEF JUDGE

MARION ALBERT PRUETT

v.

MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ETC.

No. 54000.

Supreme Court of Mississippi.

January 11, 1984.

Rehearing Denied January 25, 1984.

En banc.

BOWLING, Justice, for the Court:

This opinion involves consideration by the Court of a Petition by Marion Albert Pruett for Leave to File a Petition for Writ of Error Coram Nobis in the Circuit Court of Lowndes County, Mississippi.

There is no need to dwell at length on the principles of law necessary to be considered by this Court in determining whether or not Petitioner's application should be sustained or denied. We have clearly announced the principles before us in a number of cases, both recently and in the past. See Smith v. State, 434 So.2d 212 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); Callahan v. State, 419 So.2d 165 (Miss. 1982); Holloway v. State, 261 So.2d 799 (Miss. 1972); Botts v. State, 210 So.2d 777 (Miss. 1968); and Corry v. Buddendorf, 98 Miss. 98, 54 So.84 (1911).

In Callahan, supra, we adopted the language in In Re Broome's Petition, 251 Miss. 25, 168 So.2d 44 (9164), by saying the following:

> The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. There must be some error of fact and not of law affecting substantially the validity and regularity of the proceedings, which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking relief. It is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial.

In the recent case of Smith v. State, supra, we stated:

We are compelled to note that in the instant case, as is all too often the case in similar post-conviction relief efforts which come before this Court, the petitioner is in actuality merely seeking to relitigate his case. Such is not the proper function of post-conviction relief proceedings in Mississippi. The fair and orderly administration of justice dictates that a person accused of a crime be afforded the opportunity to present his claims before a fair and impartial tribunal. It does not require that he be given multiple opportunities to "take a bite at the apple." Likewise, the orderly administration of justice does not require this Court to "lead a defendant by the hand" through the criminal justice system. It is this Court's responsibility to provide a meaningful opportunity for defendant to raise his claims and have them adjudicated.

In Botts v. State, supra, we said:

The function of a writ of error coram nobis is to bring to the court's attention some matter or fact

> which does not appear on the face of the record which was unknown to the court or the parties at the time, and which, if known, and properly presented, would have prevented the rendition of the original judgment.

In Holloway v. State, supra, we filed the following:

> Moreover, if there was prejudice resulting from the "show up" or "line up," the facts and circumstances were known to petitioner and petitioner's present objection should have been raised at the trial. No such proposition was advanced or submitted to the trial court, either as a pre-trial matter or in the course of the trial. Nor was it assigned as a ground in petitioner's motion for a new trial. A defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again.

Regarding matters previously litigated, we stated in Edwards v. State, 433 So.2d 906 (Miss.1983), the following:

> The present issue is contended to be focusing on the inflammatory and prejudicial remarks of the prosecution. At this point it should be noted that if the issue was raised on appeal then it has been previously litigated and therefore is barred from consideration in the present proceedings. If it were not raised on appeal, then the petitioner has accepted appeal, then the petitioner has accepted the trial court's determination of the issue. Analysis for the petitioner's ground of relief show that it was not raised on direct appeal. Objection was made at trial to the remarks of the district attorney, but the failure to specifically assign such as error in the direct appeal before this court resulted in petitioner's acceptance of the trial court's determination of

this issue; therefore it is now barred.

Petitioner, Marion Albert Pruett, was convicted on April 8, 1983, in the Circuit Court of Lowndes County [after change of venue] of the crime of capital murder and on that day concluding a bifurcated trial, the jury returned a verdict sentencing petitioner to death. The appeal to this Court resulted in the cause being affirmed on February 23, 1983. Pursuant to rules of this Court, petitioner filed his petition for a rehearing and this petition was denied on March 16, 1983. Thereafter petitioner filed a petition for writ of certiorari with the United States Supreme Court. On October 3, 1983, that court denied certiorari. Pruett v. Mississippi, ____U.S.____, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

A.

LACK OF JURISDICTION AND
CONSTITUTIONAL VENUE.

The basic contention of petitioner under this point is that the Mississippi court lacked jurisdiction to prosecute petitioner for the crime of capital murder as it occurred in two different states. The primary answer to this contention is the original opinion by this Court on the appeal here. The question was fully and adequately presented and fully briefed and argued. This Court found not merit to the contention of appellant there and the Court fully set our the authorities for its conclusion. As stated, petitioner filed a petition for rehearing and in that petition made absolutely no request for the court to change its opinion. Both for this reason and the original opinion of this Court, we hold that the question is res judicata. It has been litigated and the decision on this

on this question is final and further litigation thereon is barred. Callahan v. State, supra; Edwards v. Thigpen, supra; Wheat v. Thigpen, supra; and Smith v. State, supra.

B.

DENIAL OF FAIR TRIAL DUE TO COMMUNITY PREJUDICE.

Petitioner was indicted for capital murder in the Circuit Court of the First Judicial District of Hinds County, Mississippi. This is the most populous county in the state and includes the state capital of Mississippi. Lowndes County, with the principal city of Columbus, is in the northeast section of the state, far away from Hinds County, and usual Hinds County publicity. On motion of petitioner the lower court granted him change of venue from Hinds County to Lowndes County. Petitioner now attempts to put the trial court in error for not again, on the day of the beginning of the trial, changing the venue into another county. In the first place, there

was no request whatever for such a change. No objection was made to trying the case in Lowndes County and on the other hand, the record clearly reveals complete acquiescence by the petitioner. This claim by petitioner was not raised in the trial court and was not raised on appeal to this Court and is barred from consideration now under the petition.

C.

FAILURE TO EXCUSE FOR CAUSE
A JUROR PREJUDICED AGAINST PETITIONER.

It is contented that the juror in question should have been excused by the court for cause. This occurred during the voir dire examination. This question of law was not raised on appeal, and cannot now be considered. Petitioner, by his actions, accepted the ruling of the trial court.

The record is clear that petitioner accepted the court's ruling on selection of jurors who could be fair and impartial and particularly the juror Ferguson mentioned under this point. Any error thought to be had at that time or any alleged error now was not preserved and not presented on appeal. It is readily seen by the record that whether or not to excuse this juror peremptorily was a judgment call and petitioner did not see fit, either through himself as his attorney, or his attorney advisers, to preserve a claim on this point.

E.

USE OF PETITIONER'S INVOLUNTARY AND UNCONSTITUTIONALLY OBTAINED STATEMENT.

All contentions under this point were assigned on appeal to this Court and fully, fairly and adequately considered by the Court and the decision thereon appears in the Court's opinion with a complete discussion of the issues. There was a full, complete and long hearing on this contention

prior to petitioner's trial. The matter was fully litigated both in the lower court and in this court and decided against petitioner. Our decision is res judicata on any request for reconsideration for the same reasons previously given.

F.

UNCONSTITUTIONAL USE OF
UNRELATED BAD ACTS.

The record made in the lower court reveals that prior to indictment the trial judge had petitioner brought before him and questioned him extensively about legal representation. [Trial record pp. 4-16]. Petitioner frequently refers to the trial record, and therefore presumes that we have the privilege of doing the same. The entire record reveals that from the outset, petitioner insisted on being his attorney during all proceedings. The law and all

options granted petitioner, constitutionally and otherwise, were fully explained to petitioner. He was also questioned as to his experience in trial advocacy. Petitioner related specific - instances of cases in which he had represented himself under criminal charges. He even stated that he was such a successful attorney, that one of his cases tried by him alone, resulted in a mistrial. He stated that he had had access for many years to a federal subsidized law library while serving time in detention centers. He stated he was thoroughly familiar as to the manner in which his defense should be conducted.

Petitioner took the stand and testified on the sentencing phase of the trial and reiterated when he was specifically asked, "you are your own attorney, are you not?" and he answered,

"Yes, sir, I am." Further, "You are testifying here in court voluntarily as your own attorney, is that right?" Petitioner answered "Yes, sir, I am." [R. 931]

On final argument, the leading "legal adviser" appointed at the petitioner's request, in discussing petitioner's testimony, stated to the court and jury that "the fact of the matter is that he (petitioner) said many things today without advice from counsel. He acts as his own counsel most of the time in certain areas."

Petitioner therefore is bound by his own actions. The trial court on October 29, 1981, long before the trial on April 1982, at a time when the record clearly shows petitioner to have been without the use of any drugs of any kind and a very intelligent person, fully advised petitioner of his right to have appointed counsel. There are

many pages in the record where the trial judge went further then required to insure that petitioner fully understood his rights. With this full understanding, petitioner insisted on representing himself as his own attorney but requested that "legal advisors" be appointed to assist him. Never did petitioner change from this stand. As shown above, he reaffirmed this during his own testimony on the stand and it was reaffirmed by one of his three competent, experienced and completely qualified "legal advisors" during the closing argument. It is evident from the record that petitioner was an intelligent person. He understood everything that was said to him and all proceedings.

Petitioner can not now complain that he, as his own attorney, at his insistence, failed to preserve a possible appeal claim.

He did not preserve any claim under this section of his petition. There is no indication of any request by him for advice from his legal advisors. He did not raise any such claim on appeal; and he is both barred and estopped from raising such claims here at this time. [See authorities hereinbefore set out.]

G.

USE OF INFLAMMATORY PHOTOGRAPHS.

[7] Petitioner claims the application for the writ should be granted because of the introduction of certain photographs of the victim's remains. We first note that neither petitioner, as his own attorney, nor any of his three competent legal advisors, raised this question on appeal. We held as a fact in discussing the cause on appeal, that there was no contention or indication that petitioner was mentally incompetent at

any time and that petitioner was mentally incompetent at any time and that petitioner was a very intelligent and crafty individual from a study of the record. Under all authorities, the trial court cannot be put in error regarding any contention under this point.

H.

IMPROPER CLOSING ARGUMENT-GUILT-INNOCENCE.

[8] We adopt the language set out above under contention G.

I.

DENIAL OF A FAIR TRIAL-GUILT-INNOCENCE.

[9] Under this contention we adopt the language hereinbefore set out under claim G.

J.

JUROR'S VIOLATION OF OATH.

[10] The contention under this section was assigned as error on appeal to this Court and was fully discussed in the Court's

opinion giving an explanation as to why the contention was not reversible error. We concluded that in addition to being no legal error, that if any person would ever change his mind regarding a prior opinion against the death penalty in any case, this was the case for that change to be made. The claim was fully argued and considered on appeal and the opinion of this Court affirming the cause bars relitigation.

K.

CONSIDERATION OF IMPROPER AGGRAVATING CIRCUMSTANCES

Petitioner claims error in the admission of a videotaped interview of petitioner while he was incarcerated. This claim was presented on appeal to this Court and fully and finally decided by the Court in its opinion affirming the cause. The claim is res judicata and cannot be reconsidered in the posture claimed.

L.

IMPROPER LIMITATION OF TESTIMONY
BY AND CROSS EXAMINATION OF
MITIGATING WITNESSES.

Under this point petitioner complains of rulings during the testimony of witness Norma Jean Gammill. Neither petitioner, as his own attorney, nor his three competent advisors, presented any claim on appeal regarding the witness' testimony. A consideration of any errors in that testimony is completely forbidden under out standards hereinbefore set out in considering petitions for writs of error coram nobis.

M.

IMPROPER INSTRUCTIONS AND
IMPROPER JURY FINDINGS AT SENTENCING.

As hereinbefore discussed, a consideration of the allegations under this section is not proper under the requirements and standards set up by authorities heretofore cited.

IMPROPER CLOSING
ARGUMENT-SENTENCING.

Neither appellant, as his own attorney, nor his legal advisors, preserved any alleged irregularities or errors in closing arguments, and no claim of such has heretofore been made either in the lower court or on appeal to this Court. The allegations of the petitioner under this point prohibit consideration under the authorities hereinfore cited.

O.

DENIAL OF FUNDAMENTALLY FAIR
SENTENCING HEARING.

Here we adopt the finding set out under section L. above.

P.

INADEQUATE SENTENCING REPORT.

In addition to the finding under section L. above, the opinion of this Court on initial appeal clearly stated that we had considered all facets of the cause and everything in the entire record as required by statute. Any claim under this point is barred.

Q.

INADEQUATE APPELLATE REVIEW.

Here we adopt the ruling in section P. above.

R.

DISCRIMINATORY APPLICATION OF DEATH PENALTY.

It is first noted that the material attached to the petition and propounded under this point is inapplicable to petitioner's contention here. By its terms, the courts of Mississippi are condemned because of discrimination against blacks in death penalty cases. Statistics reveal that this is not an accurate statement. petitioner is white; his victim was white. Petitioner's contention under this point is ridiculous. In addition, the entire contention is barred. No such contention whatever was made in the lower court, or preserved on appeal to this Court, or argued or presented to this Court for decision.

S.

INEFFECTIVE ASSISTANCE
OF COUNSEL.

Here we adopt what we said in section F. No person, either layman, lawyer or a member of the judiciary, could contend that under the record in this case, petitioner did not have every opportunity to have effective assistance of counsel. He intelligently described to the trial court before indictment about prior cases he had defended alone, some of them successfully, and explained in detail his knowledge of the law and where he received that knowledge. Throughout, as hereinbefore stated, he contended that he was his own attorney. To ignore this now would make a mockery of the judicial system, both state and federal. It would permit "sandbagging" by an defendant charged with any crime.

Furthermore, it is evident after this Court's careful study of the ten volumes of the record, that petitioner's advisory attorneys insured that petitioner received every benefit legally possible. Under the statutory mandates, this Court is required to review all death penalty cases to the fullest extent, regardless of written assigned errors. We found as a fact as shown by the opinion that petitioner's advisory attorneys were highly competent, having a good reputation as trial attorneys in criminal cases, and that the securing of more competent and experienced attorneys would have been hard to do.

The contentions under this section of the petition do not make any allegations that petitioner, as his own attorney, requested advice from his experienced trial advisors.

Petitioner now attempts to secure relief from the written opinion of an alleged expert psychologist whose opinion admittedly was based on letters from petitioner's present attorneys. There was no contention made throughout the trial of the appeal in nay manner that petitioner, was is or ever had been mentally incompetent. He cannot now so contend.

We carefully have studied each contention of petitioner alleging that his "attorneys" were ineffective in a number of principal contentions under the application for writ of error coram nobis. Petitioner, as his own attorney, made no contention on appeal to this court originally regarding any incompetence of his three court-appointed legal assistants. He cannot do so now.

We are constrained to observe that those who are now propounding 123 invalid contentions before this Court to allow petitioner to play games with the Court system would have better served petitioner to have appeared at the outset and placed themselves in the trenches at the lower court and appellate court level. We further observe that even though these "Johnny-come-lately" attorneys attempted to secure relief from the United States Supreme Court by way of certiorari, they were not successful in doing any more before that Court than petitioner had done prior to his conviction being affirmed.

It is obvious that these "Johnny-Come-Latelies" who, in the opinion of this writer, end up causing their client more grief than relief. As stated by United States Supreme Court Chief Justice Burger in Sullivan v. Wainwright, ___U.S.____, 104 S.Ct. 290, 78 L.Ed.2d 248:

> The arguments so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of ten years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago.

The sporting contest referred to by Chief Justice Burger has now begun in the case involving petitioner, which resulted from one of the most heinous and brutal murders that has ever been presented to a jury in any state. We cannot be accused of judging his actions, as he voluntarily, as his own attorney, got on the stand under oath and described every gruesome detail of his murderous acts. Complete guilt was admitted.

T.

RELIEF REQUESTED.

As hereinbefore discussed, we find that none of the claims of petitioner under his application for Writ of Error Coram Nobis are legally allowable claims under the guidelines set out in the authorities hereinbefore discussed and the requirements of those authorities. We, therefore, deny the Application for Leave to File a Petition for Writ of Error Coram Nobis.

APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS, DENIED.

Execution of Petitioner, Marion Albert Pruett, in the manner prescribed by law, shall be hereby reset for Wednesday, February 1, 1984.

WALKER and BROOM, P.JJ., and ROY NOBLE LEE and HAWKINS, J.J., concur.

PATTERSON, C.J., concurs with result reached by both BOWLING and ROBERTSON, JJ.

ROBERTSON, J., PATTERSON, C.J., and DAN M. LEE and PRATHER, JJ., specially concur.

ROBERTSON, Justice, specially concurring:

I.

Marion Albert Pruett has been finally convicted of capital murder and sentenced to suffer death in the manner provided by law. Pruett's conviction and sentence have been affirmed on direct appeal. See Pruett v. State, 431 So.2d 1101 (Miss. 1983). His petition for rehearing has been denied.[1] In due course, Pruett sought relief via a

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[1] After careful study of the matter while pending on direct appeal, I concluded without serious reservations that Pruett had been convicted and sentenced consistent with the Constitution of the United States and consistent with the Constitution and laws of the State of Mississippi. Accordingly I voted with a majority of the Court to affirm and subsequently to deny rehearing.

petition for a writ of certiorari in the Supreme Court of the United States. That application was denied October 3, 1983. Pruett v. Mississippi, __U.S.___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

Pruett has now instituted post-conviction proceedings in this Court. Specifically, he has invoked the writ of error coram nobis [see Miss.Code Ann. §99-35-145 (1972); Rule 38, Miss.Sup.Ct. Rules] and has asked that both his conviction and sentence be vacated. This is Pruett's last procedural gasp available under Mississippi Law.

In his petition, Pruett has asserted nineteen separate grounds, any one of which, if credited, could resulted in his conviction, or sentence, or both, being vacated. Under our procedure, we review Pruett's filing to determine whether it is

sufficient to grant relief as a matter of law or, where factual matters are involved, whether it is sufficient to require an evidentiary hearing in the Circuit Court. Rule 38, Miss.Sup.Ct.Rules; Cf. Rule 8.07, Uniform Criminal Rules of Circuit Court Practice; Sanders v. State, 440 So.2d 278, 284-85 (Miss. 1983). In this connection, we have received excellent briefs from both the attorneys representing Pruett and from the office of the Attorney General on behalf of the state. Indeed, it is appropriate that counsel be commended for the competence and professionalism with which they have presented to the court this case which, as all know, arises out of one of the most sensationalized and emotionally charged

crimes in the recent history of this state.

I have now carefully studied the papers filed in Pruett's behalf as well as those filed by the Attorney General in opposition. It is my judgment that neither Pruett's conviction nor his sentence may lawfully be disturbed. I unreservedly join in today's judgement denying as it does any relief on Marion Albert Pruett's petition for leave to file a Petition for Writ of Error Coram Nobis in the Circuit Court of Lowndes County, Mississippi.

As certain as I am that today's judgment is correct, I am of the view that much of the majority's rationale is in error. I find some of the gratuitous dicta at the end of the majority opinion

unfortunate. I regard these as matters of considerable importance and for that reason, with sincerest respect for the views of my colleagues, I file this special concurring opinion.

II.

My primary objection to the rationale employed en route to today's judgment is what I consider the Court's improper reliance upon Pruett's procedural defaults I disagree with the majority in the methodology of its disposal of fifteen of Pruett's nineteen points.

A.

First, the points of agreement. In his present application, Pruett has asserted four grounds that were heard on direct

appeal. These are:

(1) A. Lack of Jurisdiction and Constitutional Venue;

(2) E. Use of Petitioner's Involuntary and Unconstitutionally obtained Statement;

(3) J. Juror's Violation of Oath;

(4) K. Consideration of Improper Aggravating Circumstances.

Each of these points was assigned as error before this Court on direct appeal. Each issue was fully briefed at that time, was fully considered by the Court at that time, and was decided on its merits. Pruett v. State, 431 So.2d 1101 (Miss.1983). Absent some compelling reason why we ought to reconsider same, and specifically absent some compelling suggestion that our original decision on one or more of these points may have been in error, Pruett ought to be--and is--collaterally estopped from relitigation

of these claims.

In my concurring opinion in Edwards v. Thigpen, 433 So.2d 906 (Miss.1983), in a similar context I wrote:

> Several issues tendered have already been fully litigated. Without doubt, there is no problem with the Court's holding that further litigation of those issues in the courts of this state has been foreclosed under notions akin to res judicata and collateral estoppel.

433 So.2d at 909.

Relitigation of issues A,E,J, and K, is properly procedurally barred; that is, we invoke a rule of procedure, towit; collateral estoppel, and deny Pruett relief on any of these issues. I regard this type of procedural bar as viable in post-conviction death penalty litigation.

There are two other procedural bases upon which the majority would hold that consideration of the merits of Pruett's present application is barred. First, none of the fifteen remaining points--issues B.-D., F.-I., L.-S.--were raised on direct appeal. Second, seven of those fifteen points were not technically preserved by timely objection or motion in the trial court. I regard these procedural bars as inappropriate and unnecessary in post-conviction death penalty litigation.

I have on several occasions set forth my views that these types of procedural bars have at best a limited role in this type case. In Hill v. State, 432 So.2d 427, 443-451 (Miss.1983), I explained why on direct appeal these two types of procedural bars should almost never be enforced, absent

a conscious waiver by the defendant at trial. In In re Evans, 441 So.2d 520, 553 (Miss. 1983), and King v. Thigpen, 441 So.2d 1365, 1370 (Miss. 1983), I explained how, on post-conviction proceedings, these two types of procedural bars should not preclude consideration of petitioner's claims on the merits provided a cause or prejudice test be met.

I am very much aware that none of my opinions in these cases have been joined by a majority of the members of this Court.[2]

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[2] My opinion in the Hill case was joined by Chief Justice Patterson. My opinion in Evans was joined by Justices Hawkins and Prather. My opinion in King was joined by Chief Justice Patterson and by Justices Hawkins and Prather. There is, of course, no reason to repeat my previous discourses on this subject. I refer here to my opinions in Hill, Evans and King, and I trust it is apparent that what I have said in those cases has equal application here.

Indeed, in at lease five cases within the past year this Court invoked these sorts of procedural bars to avoid a decision on the merits of one or more of a condemned prisoner-petitioner's error coram nobis application. See Wheat v. Thigpen, 431 So2d 486 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Smith v. State, 434 So.2d 212 (Miss. 1983); In re Evans, 441 So.2d 520 (Miss. 1983); and King v. Thigpen 441 So.2d 1365 (Miss. 1983).

In this context, I recognize my obligation to consider whether the point has been decided so that I am bound under notions of stare decisis to adhere. Specifically, I have considered carefully

whether the majority opinions in Wheat, Edwards, Smith, Evans and King establish a rule of law that, in all cases where a state prisoner seeks post-conviction relief, the courts of this state have no authority to consider the merits of the prisoner's claim if he either failed to raise the point on direct appeal or failed timely to preserve the point in the trial court. My reading of the majority opinions in these five cases makes it clear to me that we have no case which squarely so holds.[3]

Beyond that, it is no secret that we have cases--non-capital cases at that--which hold precisely the contrary of what the majority says is the office of these types

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3 I have analyzed most of our recent cases in my dissenting opinion in Evans, 441 So2d at 528. That discussion should be deemed incorporated hereby reference.

of procedural bars. See e.g., Fondren v. State, 199 So.2d 625 (Miss. 1967); cf. Caldwell v. State, 443 So2d 806 (Miss. 1983) (Dan M. Lee, J., dissenting); In re Evans, 441 So2d 520 (Miss. 1983) (Robertson, J., dissenting. § II(B).

In the final analysis, however, I consider it my duty to continue to suggest error in our use of procedural bar in these cases on fundamental policy grounds. As a matter of intuitive as well as deductive logic, the interest of justice simply are not served by what we are doing.

Having said this, I have now studied carefully the merits of Pruett's remaining fifteen points. Most present pure questions

of law or at most questions that can be decided on the record now before the Court. I find each point manifestly without merit. See Rule 8.07, Uniform Criminal Rules of Circuit Court Practice; Sanders v. State, 440 So2d 278, 284-85 (Miss. 1983); Tiller v. State, 440 So.2d 1001, 1004 (Miss. 1983). Were I writing for the Court I would, of course, set forth with some specificity the reasons why these claims as a matter of law entitle Pruett to no relief. In the present setting, only two need be mentioned specifically.

Pruett's Point Q. is that this Court on direct appeal performed a constitutionally inadequate review of his death sentence. Here we encounter an issue substantially similar to that pending before the supreme Court of the United States in Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982),

cert. granted,---U.S.---,103 S.Ct. 1425, 75 L.Ed.2d 787 (1983).[4]

While I recognize that the Supreme Court could well prove me wrong, my study of the point reflects no basis for believing that our review of Pruett's sentence has in any way been deficient. I regard the matter at least as clear as it appeared to the Supreme Court of the United States in Maggio v. Williams,--U.S.--, 104 S.Ct. 311, 78 LEd.2d 43 (1983).

Pruett's Point S. raises the familiar wolf cry of ineffective assistance of counsel. Specifically, Pruett charges that

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[4] For a summary of the issues pending in Harris, and the application of their pendency to specific cases, compare and contrast Autry v. Estelle, 464 U.S.---, 104S.Ct. 20, 78 L.Ed.2d 1 (1983)(White, J., in Chambers) with Maggio v. Williams, -- U.S. --, 104 S.Ct. 311, 78

the alleged ineffectiveness of his trial counsel denied him rights secured by the Sixth and Fourteenth Amendments to the Constitution of the United States. By its very nature, of course, this issue could not at this stage of the proceedings be procedurally barred from consideration on the merits. Read v. State, 430 So.2d 832, 836-42 (Miss. 1983).

I have reviewed Point S. and the factual matters submitted in support thereof to determine whether Pruett has here stated a claim upon which relief may be granted. Compare Callahan v. State, 426 So.2d 801 (Miss. 1983) with Sanders v. State, 440 So.2d 278, 284-85 (Miss. 1983); and Tiller v. State, 440 So.2d 1001, 1006 (Miss. 1983). In my view, even though Pruett may prove everything he has alleged on this point he will have failed as a matter of law to show

entitlement to any relief. At trial and on direct appeal[5] Pruett had the benefit of defense counsel more vigorous and competent than I have seen in any other capital murder case to come before this Court.

The effective assistance of trial counsel issue is also presently being rehashed before the Supreme Court of the United States. See Washington v. Strickland, 693 F.2d 1243 (11th Cir. [former 5th Cir., Unit B] 1982), cert. granted --U.S.--, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983); United States v. Cronic, 675 F.2d 1126 (19th Cir., 1982), cert. granted --U.S. --, 103 S.Ct. 1182, 75 L.Ed.2d 430 (1983). Quite likely new and more precise

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5 On direct appeal Pruett's former counsel assigned only four errors while on the instant application new counsel have raised nineteen points. This in no way suggests inadequacy of counsel on direct appeal. It is a tried and proven effective appellate tactic to concentrate on a small number of

guidelines on this troublesome issue will soon emanate from that Court. For the present, it is inconceivable to me that the Washington and Cronic cases will produce any rules which, when applied to the facts of this case (as we glean them from Pruett's present application as well as the trial record before this Court), would require a holding that at his trial Pruett was denied effective assistance of counsel.

In short, I would deny Pruett's points Q. and S. as a matter of law and on their merits, procedural niceties to the contrary notwithstanding.

(Footnote 5 continued)

> "strong" issues. Successful appellate counsel routinely eschew assignment of a plethora of errors. They wish to avoid deflecting the court's attention from the appellant's strong points. Common sense informs appellate counsel that assertion of frivolous points may undercut one's credibility on the point or two that may have merit.

III.

There is a serious problem with our procedural bar holdings in Wheat, Edwards, Smith, Evans and King that I have heretofore overlooked. This problem exists in the context of the acknowledged popular imperative for the just and efficient administration and enforcement of our capital sentencing system. It arises from our responsibility as the highest court of a sovereign state vested with front line responsibility for the development of criminal constitutional rules designed to implement the Supreme Court's mandate for guided discretion capital sentencing systems. Its urgency is accentuated by growing public dissatisfaction with seemingly interminable delays in death penalty litigation, delays seemingly unrelated to service of the interests of justice.

A review of the error coran nobis applications that have come before this Court, beginning with Wheat, makes clear that they often raise the same issues, over and over. This is particularly true of constitutionally grounded issues surrounding the sentencing phase and appellate review. We fail properly to regard the interests of judicial efficiency when, instead meeting such issues head-on and authoritatively deciding them on their merits (after the full briefing we regularly receive in these matters) we hold them procedurally barred five cases in a row.[6] Particularly is this

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6 To illustrate the point stated above, consider the following: (a) Pruett's Point M urges that improper jury instructions were given at the sentencing phase of his trial. The majority refuses to address the merits of the claim on grounds that it is procedurally barred. In at least four of our 1983 post-conviction death penalty decisions, we have been presented with similar, if not legally identical, arguments that improper jury instructions were given at the sentencing phase of a capital

(Footnote 6 continued)

murder trial. Today, for the fifth consecutive time, we hold consideration of the merits of this issue barred by the petitioner's procedural defaults either at trial or on direct appeal. See Wheat v. Thigpen, supra, 431 So.2d at 488; Edwards v. Thigpen, supra, 433 So.2d at 908; In Re Evans, supra, 441 so.2d at 522; King v. Thigpen, supra, 441 So.2d at 1371. We know that there are dozens of capital murder cases yet to be heard in this Court, in each of which if affirmed on direct appeal we may be certain that post-conviction proceedings will be brought. We know that in a substantial number of these the very same issues regarding jury instructions at the sentencing phase will be raised. To me, it seems appropriate and efficient that we consider and decide the issue on its merits.

(b) Pruett's Point N urges that improper closing arguments were given at the sentencing phase of his trial. The majority refuses to address the merits of the claim on the grounds that it is

(Footnote 6 continued)

procedurally barred. In at least four of our 1983 post-conviction death penalty decisions, we have been presented with similar, if not legally identical, arguments. Today, again, for the fifth consecutive time, we hold consideration of the merits of this issue barred by the petitioner's procedural defaults either at a trail or on direct appeal. See Wheat v. Thigpen, supra, 431 So.2d at 488; Edwards v. Thigpen, supra, 433 So.2d at 908; Smith v. State, supra, 434 So.2d at 216: King v. Thigpen, supra, 441 So.2d 1365. Again it would seem appropriate and efficient to consider and decide the issue on its merits.

(c) Pruett's point P urges failure to require an adequate pre-sentence report during the sentencing phase of his trial. Again, the majority refuses to address the merits of the claim on grounds that it is procedurally barred. In at least two of our 1983 post-conviction death penalty decisions, we have been presented with similar, if not legally

(Footnote 6 continued)

identical, arguments regrading the alleged failure to require and adequate pre-sentence report during the sentencing phase of a capital murder trial. Today, for the third time, we hold consideration of the merits of this issue barred by the petitioner's procedural defaults either at trial or on direct appeal. See Smith v. State, supra, 434 So.2d at 217-218; and In re Evans, supra, 441 So. 2d at 523.

(d) Pruett's Point Q urges alleged inadequate appellate review of the death sentence imposed upon him. Today, for the fourth time within the past year, we hold consideration of the merits of this issue barred by the petitioner's procedural defaults either at trial or on direct appeal. See Smith v. State, supra, 434 So.2d at 218; In re Evans, supra, 441 So2d at 523.

so when we realize that we will continue to encounter the issue in practically every post-conviction petition until it is decided authoritatively on the merits either in this Court or in the Supreme Court of the United States.

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), introduced a new era. Bifurcated trials and appellate sentence review were theretofore unheard of in Mississippi--as well as in most other jurisdictions. The seven-and-one-half years since Gregg have produced much "delay" and "confusion". As lawyers know, this often occurs in the years immediately following enunciations of a major new principle of law. See, e.g., the aftermath of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and which I summarized briefly in Walters v. Inexco Oil Co. 440 So.2d 268, 272-74 (Miss. 1983), and more recently the

the progency of Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405-408, 90 S.Ct. 1772, 1790-91, 26 L.Ed.2d339, 359-61 (1970); and State Stove Manufacturing Company v. Hodges, 189 So.d 113 (Miss. 1966). That process here has been more tedious than usual because human life is on teh line, because "death is different". See Hill v. State, 432 So.2d 427, 444-47 (Miss. 1983) (Robertson, J., dissenting).

When this occurs, it becomes our responsibility to assist in fleshing out the new doctrine with deliberately considered holdings in individual cases as they arise. This we and our sister courts must do if the law is ever to become settled. ONly when tne law has become settled will we begin to make progress toward consistent achievement of the twin ends of finality and justice in death penalty litigation.

Our recent practice of invoking procedural bars in death penalty cases substantially delays the settlement of the law. We substantially put off the day when the post-conviction review of death sentences may begin to be brought to a conclusion within a reasonable period of time. So long as major questions remain unsettled, delay and confusion-and, perhaps even more significantly-seemingly arbitrary inflictions of the death penalty-will remain the order of the day.

In the past year in Wheat, et al., we have allowed our frustration with the magnitude and burden of death penalty adjudications to lead us to shortsightedness. We cut off our noses to spite our faces. We hold an issue procedurally barred five cases running when

surely common sense suggests that a carefully considered and authoritative decision on the merits just once would establish a precedent that would greatly facilitate our review of all subsequent cases. If our goal be progress toward consistent achievement of the finality and justice in death penalty litigation, our recently charted course is in need of a substantial mid-voyage correction.

At the outset, the majority sets forth several cases describing the office of the writ of error coram nobis. We have numerous other cases which articulate the office of this writ in quite different terms. See, e.g., Windom v. State, 192 So.2d 689, 691 (Miss. 1966); Love v. State, 221 So.2d 92, 94-95 (Miss. 1969); Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975); Phillips v.

State, 421 So.2d 476, 483 (Miss. 1982). In each of these cases this Court has recognized that the writ of error coram nobis is appropriate in case of petitions such as that filed by Marion Albert Pruett. These cases hold that the writ may be used not only to bring to the Court's attention some factual matter not appearing of record but also as this state's post-conviction procedure for allowing collateral attack based upon alleged constitutional defects in the petitioner's conviction or sentence. See King v. Cook, 287 F.Supp. 269, 271-272 (N.D. Miss. 1968).

In a sense, the majority is correct in its restricted view of the office of the writ of error coram nobis. Historically, no one ever dreamt of that writ being used as a post-conviction procedural vehicle for

consideration of alleged constitutional infirmities in a prisoner's conviction or sentence. In the courts of other states and in the federal courts, the writ of habeas corpus has been used for this purpose. A decade ago, however, this Court clung to a restrictive construction of the writ of habeas corpus (see, e.g., Keller v. Romero, 303 So.2d 481, 483-84 (Mis. 1974)), and ultimately took the then (historically) dubious step of declaring the writ of error coram nobis as this state's post-conviction form of action for raising constitutional questions regarding a prisoner's conviction or sentence. See Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975); see also, King v. Cook, supra.

Forty years ago, in Anderson v. Buchanan, 292 Ky. 810, 168 S.W.2d 48 (1943), the Supreme Court of Kentucky wrote "The

writ of coram nobis appears to be the wild ass of the law which the courts cannot control." 292 Ky. at 822, 168 S.W.2d at 55.[7] This view of the writ was justifiably held decades before Mississippi began experimenting with it. See King v. Cook, supra. Suffice it to say that, at least among those familiar with the past twenty years' experience under Mississippi's bastardized version of this "wild-ass", the consensus is growing that the writ ought be gelded, if not forever interred. See e.g., Edwards v. Thigpen, 433 So.2d 906, 907 fn. 1 (Miss. 1983).

In this context, I welcome as a breath of fresh air the Attorney General's

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7 The Kentucky Court's view receives information elaboration in McPherson Coram Nobis: The Wild Ass of the Law 11 Loyola L.Rev.100 (1962).

insistence that this (and presumably all subsequent) post-conviction collateral attack be treated as procedurally commenced under Rule 8.07 of our Uniform Criminal Rules of Circuit Court Practice. I regard our adoption of Rule 8.07 as effecting a coalescence of all post-conviction relief efforts into a single procedure. Edwards v. Thigpen, 433 So.2d 906, 907 fn.1 (Miss. 1983); Sanders v. State, 440 So.2d 278, 282 fn. 1 (Miss. 1983); Tiller v. State, 440 So.2d 1001 (Miss. 1983). Here, as in civil actions, it simply makes no sense that we have neither more nor less than one form of action. Compare Rule 2, Miss.R.Civ.P.

I would adopt the Attorney General's view that we begin by assuming that this is a proceeding initiated under Rule 8.07 and go from there. In this view the description of the office of the writ of error coram nobis set forth at the outset of the majority opinion becomes irrelevant.

V.

On page 827, the majority opinion, for reasons that wholly escape me, castigates present counsel for Marion Albert Pruett. I take exception to those comments.

Representation of one charged with a capital crime is one of the most serious-and most unpleasant-responsibilities that may be visited upon a member of the bar. When the prisoner has already been convicted and sentenced and that sentence has been affirmed on direct appeal, acceptance of the case by new counsel becomes doubly onerous. They operate under sever time constraints coupled with the certain knowledge that their client's life is on the line.[8] Yet

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[8] The only persons who would question the substantiality of these pressures-which are unlike any other a lawyer encounters-are those who have never experienced them.

present counsel for Pruett have taken on this burden and have performed it with notable competence and professionalism. Indeed, it is because of the competence with which the matter has been presented by counsel for Pruett that I can be satisfied in my own mind that the vote I cast in this case is a proper one.

It is unfortunate that the majority opinion characterizes Pruett's present counsel as

> "Johnny-Come-Latelies" who, in the opinion of this writer, end up causing their client more grief than relief.

(Page 827). The statement becomes all the more anomalous when it is remembered that in at least seven prior Mississippi death penalty cases, which reached the procedural stage Pruett's case is now at, orders were subsequently obtained vacating the death sentence. See Washington v. Watkins, 655

F.2d 1346 (5th Cir. 1981); Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982), clarified sub nom. Jordan v. Thigpen, 688 F.2d 395 (5th Cir. 1982); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982); Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980); Irving v. Hargett, 518 F.Supp. 1127 (N.D. Miss. 1981); Reddix v. Thigpen, 554 F.Supp. 1212 (S.D. Miss. 1983); Jones v. Thigpen, 555 F.Supp. 870 (S.D. Miss. 1983).

In the context of my certain knowledge of my own responsibilities in this last gasp stage of Pruett's case before the Courts of the State of Mississippi,[9] I am grateful to his present counsel. For one, I am not offended that new points have been raised

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[9] I am well aware of the probability that Pruett will seek relief in the courts of the United States via federal habeas corpus. 28 U.S.C. § 2254. As I have urged elsewhere, however, I insist that it is our responsibility to decide these cases as a true court of last resort, as though there were no other court, and as though, if we affirmed, the sentence of death would surely be executed.

not presented on direct appeal. Rather, I compliment counsel for the zeal and, again, the professionalism with which the matter has now been presented. Before I vote finally to condemn a fellow child of God to death in the gas chamber, I want to be as certain as is humanly possible that his conviction and sentence are consistent with the Constitution of the United States and with the Constitution and laws of the state of Mississippi. Timid counsel are of no help in this regard.

I would recall the words of Justice Hawkins dissenting in Johnson v. State, 416 So.2d 383 (Miss. 1982):

> Each generation of free men owes a debt of gratitude it can never repay to those courageous lawyers in our history who have risked their livelihood, their liberty, and some even their lives in defending an unpopular cause, or an accused charged with a loathsome or heinous offense.

416 So.2d at 396. These words apply to post-conviction counsel as well as trial and appellate counsel.

I regard the representation afforded Marion Albert Pruett by his present counsel-as well as the representation afforded him by trial and appellate counsel-to be within the spirit of these words of Justice Hawkins. In a word, I regard as heroic the performance by all counsel for Pruett at all stages of the proceedings against him. See generally my recent article, The Lawyer as Hero, 53 Miss. L.J. 431 (1983). Lawyers who so serve are deserving of our gratitude.

PATTERSON, C.J., and DAN M. LEE and PRATHER, JJ., join in this opinion.

MARION ALBERT PRUETT

v.

STATE OF MISSISSIPPI

No. 54000.

Supreme Court of Mississippi.

February 23, 1983.

Rehearing Denied March 16, 1983.

En Banc.

BOWLING, Justice, for the Court:

Appellant Marion Albert Pruett was indicted in the Circuit Court of the First Judicial District of Hinds County for the crime of capital murder. Venue was moved to Lowndes County and in a bifurcated trial, as required by statute and prior decisions of

this Court, he was found guilty of the crime at the conclusion of the guilt phase. after presentation of the penalty phase to the jury, it found that appellant should be put to death as the penalty for his crime. On appeal to this Court, appellant assigns four alleged reversible errors as follows:

> I. THE LOWER COURT ERRED IN ASSUMING JURISDICTION AND VENUE OVER APPELLANT ON THE CHARGE OF CAPITAL MURDER: IN OVERRULING APPELLANT'S MOTION TO QUASH THE INDICTMENT, DIRECTED VERDICT AND PEREMPTORY INSTRUCTION; AND IN GRANTING THE STATE'S INSTRUCTION S-1.
>
> II. THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRES EVIDENCE AND ADMITTING CONFESSIONS INTO EVIDENCE WHICH WERE ELICITED FROM APPELLANT BY PROMISES OF DRUGS FROM AUTHORITIES.
>
> III. THE LOWER COURT ERRED IN SEATING MR. SIDNEY GRAHAM (JUROR #8) ON THE JURY AND APPELLANT WAS DENIED THE OPPORTUNITY TO EXERCISE PEREMPTORY CHALLENGES IN AN INTELLIGENT AND KNOWLEDGEABLE MANNER BECAUSE OF SAID JUROR'S MISSTATEMENTS DURING VOIR DIRE.

IV. THE LOWER COURT ERRED IN ADMITTING AN EDITED TELEVISION INTERVIEW INTO EVIDENCE AT THE SENTENCING PHASE OF THE TRIAL.

Appellant was indicted under Mississippi Code Annotated, Section 97-3-19(2)(e) (Supp. 1982, which provides as follows:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> * * * *
>
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

The punishment phase of the bifurcated trial was conducted pursuant to the provisions of MCA §99-19-101 (Supp. 1982). It should first be noted that no error is assigned because of any alleged failure to follow the provisions of the statute.

The facts of the crime are practically admitted in their entirety, except for one instance; that is, the events immediately prior to appellant shooting the deceased, Peggy Lowe. All underlying occurrences were testified to by appellant as his only witness during the guilt phase of the trial. There is no contention or indication that Pruett was mentally incompetent. IN fact, the entire record and history of this particular case, as well as Pruett's prior activities, clearly reveal that he is a very intelligent and crafty person. The circumstances leading to the death of Peggy Lowe were clearly revealed by appellant's

sworn testimony at the trial. Early on the morning of September 17, 1981, appellant appeared at the branch office of Unifirst Savings & Loan Association located in the Metrocenter shopping area where Peggy Lowe worked with three other female employees. According to appellant, he picked out this business because no male employees were present, stating that men would be more likely to give him trouble than women. Appellant had stayed the prior night at a motel not very far from the area. The purpose of appellant entering the savings and loan association branch office admittedly was to commit an armed robbery and to take a hostage for the purpose of making his escape. During the progress of the armed robbery, Mrs. Lowe received a call from her son and made an engagement to meet him for lunch. Appellant decided that it would suit his purposes better to take Mrs. Lowe as hostage rather than the other person originally selected.

The armed appellant then took the money and Peggy Lowe to her car and drove to another part of the shopping center. He then placed her in his car, drove around several streets in the area, and then drove to Interstate #20 and approximately 100 miles, without stopping, to Sumter County, Alabama. This county is adjacent to the Mississippi-Alabama state lines. During this entire ride appellant forced Mrs. Lowe to stay on her knees on the floorboard of the passenger from of the car, with her shoulders, arms and head downward on the seat. Whenever passing another vehicle or being passed, appellant would place his coat over Mrs. Lowe so she would not be seen. At one point during the ride, at the request of Mrs. Lowe, appellant permitted her to say a prayer.

After driving into Alabama, appellant left the interstate highway, traveled on a gravel road for a distance and then turned onto a small country road where he stopped. Mrs. Lowe was taken from the car and carried into the woods. According to appellant, he then forced her to disrobe, except for her underclothes. The purpose of this was to keep her under his control so that she would not leave the area. Appellant testified he then went to his car, took a shot of cocaine and went back to check on his prisoner. He found that she had moved from the area. He then, by his own sworn testimony, instructed her to get on her knees, put her face down and repeat her husband's telephone number so that he could be called. Mrs. Lowe was in the process of doing this when appellant, according to his testimony, shot her in the back of the head at close range. Appellant then drove away in his car and visited other parts of the country prior to being apprehended.

POINT I. THE LOWER COURT ERRED IN ASSUMING JURISDICTION AND VENUE OVER APPELLANT ON THE CHARGE OF CAPITAL MURDER; IN OVERRULING APPELLANT'S MOTION TO QUASH THE INDICTMENT, DIRECTED VERDICT AND PEREMPTORY INSTRUCTION, AND IN GRANTING THE STATE INSTRUCTION S-1.

The underlying contentions of appellant under the issues raised regarding this point are that appellant could not be indicted, tried and convicted for the crime of capital murder because the killing of Mrs. Lowe occurred in the State of Alabama.

Appellant filed a motion attacking the jurisdiction of the Hinds County, Mississippi, court and a hearing was had under stipulation by the state and appellant. This stipulation was as follows:

> That Opal H. Lowe, a/k/a Peggy Lowe, died on or about September 17, 1981. That Opal H. Lowe, a/k/a Peggy Lowe, died in Sumter County,

Alabama. That said death was caused by a gunshot would to the back of the head as more fully shown by the autopsy report; that the instrumentality causing the gunshot would to Opal H. Lowe, a/k/a Peggy Lowe was inflicted in Sumter County, Alabama, on or about September 17, 1981. That said gunshot was fired in the State of Alabama, and the fatal injury as aforesaid, was sustained in the State of Alabama; that Opal H. (Peggy) Lowe had been taken by force, held hostage, and kidnapped in Jackson, Hinds County, Mississippi, on the 17th day of September, 1981, and transported against her will across the Mississippi-Alabama state line into Sumter County, Alabama, where the said Opal H. Lowe, a/k/a Peggy Lowe, sustained the aforesaid gunshot wound. That the body of Opal H. (Peggy) Loew was found in Sumter County, Alabama, on the 27th day of October, 1981.

Appellant contends that the killing of Mrs. Lowe was "murder" that occurred in the State of Alabama for which only Alabama had

jurisdiction. He contends that the indictment and trial of appellant for "capital murder" did not change the act of killing from one single crime consummated in Alabama. Appellant cites several cases regarding venue and jurisdiction from courts of several states. We have examined those cases and find they have no application here. Unquestionably, the State of Alabama could have indicted and tried appellant for murder in that state. It did not do so. The first indictment returned against appellant was in Hinds county, Mississippi, from which county Mrs. Lowe admittedly was kidnapped.

As hereinabefore stated, appellant was indicted under the provisions of MCA §97-3-19. Under that section the crime of "murder" is defined as the killing of a human being without authority of law by any means or in any manner in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being.

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

The specific indictment returned against appellant was that of "capital murder" under the provisions of MCA §97-3-19(2)(e) which as hereinbefore set out required conviction for the killing of a human being without the authority of law by any means or in any manner, when done with or without ~~any design to effect~~ death of by any person engaged in

the commission of the crime of rape, burglary, kidnapping, arson or robbery or any attempt to commit such felonies.

The instrument under which appellant was indicted reads as follows:

> That Marion Albert Pruett in said District, County and State on the 17th day of September A.D., 1981, was then and there engaged in the commission of the crime of kidnapping of Opal H. Lowe, a/k/a/ Peggy Lowe, by he (sic) the said Marion Albert Pruett then and there feloniously without lawful authority, forcibly seizing and confining the said Opal H. Lowe, a/k/a peggy Lowe, with his intent to cause said Opal H. Lowe, a/k/a Peggy Lowe to be confined against her will, contrary to Section 97-3-53, Mississippi Code of 1972, annotated and amended, and while so engaged in said kidnapping, he, the said Marion Albert Pruett, did then and there, without authority of law, feloniously kill and murder Opal H. Lowe, a/k/a Peggy Lowe, a human being, contrary to and in violation of Section 97-3-19(2)(e), Mississippi Code of 1972, annotated and amended.

Indisputably, the first element of the crime of "capital murder" under the indictment was the kidnapping of Mrs. Lowe. This underlying and necessary to be proved felony continued unbroken until the wooded area in Alabama was reached. We then find the only possible controversy in the record regarding the acts constituting the crime. Appellant testified after making Mrs. Lowe disrobe, he was away from her about fifteen minutes before the chain of events constituting the "capital murder." In addition to this, more than one witness, who visited the scene of the killing with appellant after his apprehension, testified that appellant told them he got no more than around 10 to 15 feet from Mrs. Lowe the entire time. We therefore have two separate admissions. At least it was for the jury to determine whether appellant abandoned the kidnapping and then resumed the act as a

"murder." In our opinion under appellant's own testimony, he kept complete control of Mrs. Lowe. that was the reason he forced her to disrobe. This control existed until appellant shot Mrs. Lowe in the back of her head. As said above, assuming this to be a finding of fact, the testimony of the witnesses contradicted appellant's testimony that he went to his car for about fifteen minutes before returning and killing Mrs. Lowe. He told them he only went approximately 10-15 feet from her which easily could have resulted in a resolving of the extent of the kidnapping control by the jury.

The killing of Mrs. Lowe in Alabama could not have been capital murder unless she first had been kidnapped. The acts are inseparable under that crime. Appellant

contends that the actual pulling of the trigger was the primary element of the capital murder. If this is true, then there would be no kidnapping by appellant and he would have only had a dead body to steal. He stole the live body activating the elements of the crime of capital murder.

Long before the capital murder statute was enacted by the legislature, our statutes included MCA §99-11-17, which provides as follows:

> Offenses commenced in and consummated out of state.
>
> Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded.

It is inescapable that the essential and, indeed, underlying element of the crime of capital murder started in Hinds County,

Mississippi, when appellant, with a gun drawn and the money sack in his hand, forcefully took Peggy Lowe from her place of employment and admittedly committed the acts hereinbefore set out regarding the kidnapping and killing.

Appellant attempts to raise an issue regarding his request for, and the court granting, an instruction on the lesser included offense of murder. He contends that if the jury had returned such a verdict, it would have been void and for this reason the jurisdictional question should be decided in his favor. Our first reaction to this contention is that appellant may be correct in principle, but his argument is not reasonable. In Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), the lower court refused to grant the accused an instruction on the lesser included offense of murder. The Fifth

Circuit Court held that the instruction should be granted in a capital murder case, "if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." The appeals court then went to say, however, "there is no due process violation, however, unless there is some evidence to support an instruction on the lesser included offense." Furthermore, the appellate court said, "In Mississippi no murder committed during the course of a robbery can be simple murder. Since Bell testified to the robbery any murder committed had to be capital." We have the same situation here. Although appellant contends that in his view, he was away from the deceased, after stripping her of clothing to keep her in hand, for fifteen minutes before

actually killing her, it is our opinion that as a matter of law the underlying felony of kidnapping never ceased under the testimony. We are forced to the conclusion, therefore, that as the kidnapping was admitted by appellant, the killing could not have been simple murder under the Mississippi statute. We do not have the element as in Bell, i.e., a lack of definition of armed robbery. We have the actual sworn testimony of appellant regarding the undisputed kidnapping. We are forced to conclusion therefore, that even had the lower court in the case sub judice refused the lesser included offense instruction, any error would have been harmless under the Bell decision.

We have to go further and recognize as stated above that the lesser included offense instruction was actually given. A clear

answer to this is as stated in Bell. "[N]o rational jury could have acquitted him of kidnapping or robbery on the evidence presented." In the case sub judice, no rational jury could have acquitted Pruett of kidnapping, even until the time the bullet entered the back of the head of the deceased.

answer to this is as stated in Bell. "[N]o rational jury could have acquitted him of kidnapping or robbery on the evidence presented." In the case sub judice, no rational jury could have acquitted Pruett of kidnapping, even until the time the bullet entered the back of the head of the deceased.

We, therefore, have a situation where appellant voluntarily requested and was given an instruction to which he was not entitled. If wrong in this, however, such does not change a decision of the case. Even if by some strange jury finding, it had returned a verdict of "not guilty" of capital murder but guilty of simple murder, the verdict merely would have been void. Appellant would, therefore, have benefitted from something to which he was not entitled. He was given more than that to which he was entitled and therefore cannot complain.

POINT II. THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND ADMITTING CONFESSIONS INTO EVIDENCE WHICH WERE ELICITED FROM APPELLANT BY PROMISES OF DRUGS FROM AUTHORITIES.

Prior to trial appellant filed a motion to suppress evidence and quash the indictment. This motion recited that appellant was apprehended by law enforcement officers in Stratford, Texas, on October 17, 1981. He was thereafter taken into custody by two officers of the Federal Bureau of Investigation, Agents T. Scott Hendricks and Thomas G. Wagner. The motion does not address any question as to the guilt or innocence of appellant, it already having been assumed by everyone that he was guilty of killing Mrs. Lowe. The motion only addressed whether or not appellant voluntarily agreed to lead officers to her body. Appellant contended in the motion that the two agents offered him cocaine to tell them where the body was located.

Other than the allegations regarding the two FBI agents in Texas, appellant complained that the promises were tendered by O.T. McAlpin of the Jackson Police Department, Detective Monroe and another Jackson police officer, whose name he did not know at that time. The motion stated that these three Jackson police department officers made essentially the same promises as the two FBI agents in Texas. Appellant further contends in the motion that Jackson Police Chief Jim Black and Detective Willie H. Covington ratified the drug promises.

At the pre-trial hearing on the motion to suppress, all of the above named officers testified positively on behalf of the state that the allegations of the motion were untrue and all testified in much detail, both on direct and cross examination, as to what

actually happened in their relations with Pruett from the time he was arrested until he finally decided to take them to Mrs. Lowe's body in Sumter County, Alabama. The appellant testified regarding promises of cocaine. He now contends that the state should have reintroduced all the persons he named in his motion to reaffirm their testimony given on direct examination denying ever making any promises of any kind, drug production or otherwise, to appellant. In propounding this contention appellant relies on Agee v. State, 185 So.2d 671 (Miss. 1966), and Holt v. State, 348 So.2d 434 (Miss. 1977).

It suffices to say that every required element in Agee and Holt, supra, was met. Appellant had filed his petition setting out only the contention that he had been promised drugs to reveal the location of Mrs. Lowe's

body. As hereinbefore stated all persons connected with this contention and named by appellant testified, consuming many pages of testimony denying this contention in detail and explaining everything that occurred. The law does not require foolish actions. This would have been the case had the state been required to resubmit all these officers to repeat everything already testified to under oath including extensive cross examinations.

The personal sworn testimony of appellant as the only defense witness in the guilt phase of the trial, is inconsistent with his contention in the motion to suppress. He testified that the reason he finally decided to lead officers to Mrs. Lowe's body was so that her family could give her a Christian burial. His testimony was positive that this decision to do this was not based on any promises whatever from anyone.

Under this point appellant contends that the testimony of U.S. Marshals Leonard and Crumpton should have been excluded at the trial. These marshals from the Jackson, Mississippi, office accompanied the entourage that appellant escorted to Mrs. Lowe's body. It is first noted, as before stated, that the motion to suppress only encompassed the alleged offenses from the time of the appellant's arrest in Texas until his incarceration in the Jackson, Mississippi, jail. He made no complaint of confessions under duress during his trip from Jackson to the scene of the killing. It is readily apparent that the testimony of United States Marshals Leonard and Crumpton were not required on the hearing on the motion to suppress as they had nothing to do with the allegations of the motion.

As a precaution, however, when appellant's attorneys objected to the two marshals testifying about what occurred on

the trip to Alabama, the trial court wisely excluded the jury and heard the testimony out of the jury's presence. They were extensively cross examined and any possible error was thereby cured. We reiterate the admission of their testimony at the prior hearing was not required.

On the issue of whether or not appellant, as he testified, voluntarily decided to lead officers to Mrs. Lowe's body, we have the unusual set of circumstances that he did this by leading them through country back roads in the nighttime hours and straight to Mrs. Lowe's body even though he had been at that location and over those roads one time; that is, the day the kidnapping and killing of Mrs. Lowe occurred. We say this to emphasize the intelligence of appellant and the fact he knew what he was voluntarily doing and was not under the influence of drugs. This, of course, was never suggested.

POINT III: THE LOWER COURT ERRED IN SEATING MR. SIDNEY GRAHAM (JUROR #8) ON THE JURY AND APPELLANT WAS DENIED THE OPPORTUNITY TO EXERCISE PEREMPTORY CHALLENGES IN AN INTELLIGENT AND KNOWLEDGEABLE MANNER BECAUSE OF JUROR'S MISSTATEMENTS DURING VOIR DIRE.

During the course of the trial judge's voir dire questioning of the jury panel members individually, one juror, Sidney Graham, stated that he could vote guilty of the crime of capital murder but under no circumstances could he vote for the death penalty. After completion of the voir dire examination, which was done thoroughly by the trial judge, the prosecuting attorney and competent defense attorneys, the jury was selected and placed in the jury box with two alternates. Admittedly, the prosecuting attorney realized that he had made a mistake and confused the number of juror Graham with another. He had selected Graham, although he was definitely opposed to the death penalty.

The prosecutor requested the trial court to allow him to amend his jury striking and either voir dire other jurors or permit an alternate to take the place of Mr. Graham. The court refused permission to do this, saying it came too late, the state already had accepted the fourteen jurors.

During the above set out request by the prosecuting attorney, the attorneys for appellant vigorously objected to the court granting the prosecutor's request and vigorously objected to the court granting the prosecutor's request and vigorously objected to juror Graham being excused. The trial judge agreed with them. Of course, it does not take much trial experience to know the defense accepted Mr. Graham.

Appellant now contends that the court was in error in not dismissing Mr. Graham. It should suffice to say that this was

vigorously tried to be accomplished by the state over equally vigorous opposition by appellant's attorneys, who now are trying to put the court in error for seating the juror. The state went so far as to try and secure the sentencing hearing of the bifurcated trial by another jury. This request of the state was refused by the trial court.

There is no question involved in this assignment regarding the propriety of the extensive voir dire examination of the jury panel. The next question, therefore, is why was there a unanimous jury verdict sentencing appellate to death? We do not need to do much surmising in arriving at a conclusion regarding this question. In the first place, it is obvious and also impressive that eleven jurors other than Mr. Graham were

unanimous in their verdict after hearing the testimony shown in the record. There is absolutely no accusation of fraud on the part of juror Graham.

As heretofore seen, appellate was indicted in the First Judicial District of Hinds County, Mississippi, the most heavily populated county, located in the central-western section of the state and the state capital. Prior to trial, appellant's attorneys filed a motion to change venue of the trial because of extensive publicity, mainly through television and press media. The trial court agreed with this motion and changed the venue of the cause to a county in the northeast part of the state, which county is indisputably out of the range of all Hinds County television stations. We have to surmise as to what information, if any, juror

Graham had about the case prior to trial. It is entirely possible that he had never read or heard of the heinousness of appellant's actions and entirely possible that he had not had any experience with similar heinous crimes. We, therefore, are led to the reasonable probability that his opinion regarding the death penalty was derived from experiences foreign to the case with which we are now involved.

If any person would ever change his mind regarding a prior opinion against the death penalty in any case, this was a typical case for that change to have been made. Juror Graham sat close by appellant when he gave his testimony regarding the details of the robbery, kidnapping and the actions toward Mrs. Lowe up to the time he put a bullet in the back of her head. He heard appellant

tell of other murders and robberies. He sat closely to appellant during the entire trial observing and seeing a man who would do what appellant admittedly did in this case and would commit other murder as appellant readily admitted during his testimony. How can it now be said then that Juror Graham violated his oath and that because of such violation, appellant is entitled to a new trial. There is no indication that anything occurred except that the juror changed his mind. There is nothing to indicate duress, undue influence by other jurors, or any other wrong. We find no reversible error here.

POINT IV: THE LOWER COURT ERRED IN ADMITTING AN EDITED TELEVISION INTERVIEW INTO EVIDENCE AT THE SENTENCING PHASE OF THE TRIAL.

Appellant alleges reversible error by the trial court in permitting portions of a taped televison interview with appellant in the Jackson, Mississippi, jail the day after

he led officers to Mrs. Lowe's body. The trial court admittedly edited this tape and permitted parts of it to be shown together with sound during the sentencing phase of the bifurcated trial. Appellant's main contention is that as the tape was used along with other evidence to secure a change of venue, it was thereby improper for it to be presented to the jury in the county to which the case was changed.

The obvious answer to the above contention is that the taped interview was used in the heaing on the motion to change venue solely to show that television viewers in the Hinds County, Mississippi, area would have seen and heard the interview. As above stated, the television range of Hinds County television stations did not reach Lowndes county, where the case was tried, a far distance from hinds County. There was no

evidence whatever that the taped interview was seen by anyone in the Lowndes County area.

A transcription of the questions and answers during the taped interview appears in the record and an examination thereof does not begin to compare with appellant's sworn testimony at the trial and could not possibly have done him as much harm as his personal testimony before the jury reciting the gory details of his killing of Mrs. Lowe.

Appellant also contends that introduction of the partial video tape in the sentencing phase was error as it was in essence a confession by appellant. As stated, above, this so-called confession was minimal compared to the prior testimony heard by the jury from appellant's own mouth on the witness stand as to the details of the commission of the crime. We find no merit to this alleged assignment of error.

CONCLUSION

The Court has carefully considered the entire record in the cause together with all briefs, instruments appearing as evidence, exhibits, and everything required of an appellate court. The jury was fully, properly and fairly instructed in both phases of the bifurcated trial. No alleged error is raised in that regard other than on the motion to suppress, and we can find none after a complete review. We have compared this record with prior cases involving the affirmances of the death penalty by this court. We have placed in our minds the facts of all such death cases since this Court's opinion in Jackson v. State, 337 So.2d 1242 (Miss. 1976). A study of these cases include, but are not limited to the following: Washington v. State, 361 so.2d 61 (Miss. 1978); Irving v. State, 361 So.2d

1360 (Miss. 1978); Jordan v. State, 365 So.2d 1198 (Miss. 1978); Gray v. State, 375 So2d 994 (Miss 1979); Culberson v. State, 379 So.2d 499 (Miss. 1979); Reddix v. State, 381 So.2d 999, (Miss. 1980); Bullock v. State, 391 So.2d 601 (Miss. 1980); Edwards v. State, 413 So.2d 1007 (Miss. 1982); Johnson v. State, 416 So.2d 383 (Miss. 1982); Smith v. State, 419 So.2d 563 (Miss. 1982); Wheat v. State, 420 So.2d 229 (Miss. 1982); King v. State, 421 So.2d 1009 (Miss. 1982); and Evans v. State, 422 so.2d 737 (Miss. 1982).

We find after careful examination that the evidence fully supports the jury's finding of statutory aggravating circumstances as enumerated in MCA § 99-19-101. We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in the similar cases considering both the crime and the defendant.

We cannot say with any degree of emphasis that the sentence of death was imposed under the influence of bias, prejudice or any other arbitrary factor.

We have reviewed and fully considered the sworn testimony of appellant confessing become a Christian. A careful reading of appellant's testimony both direct and on cross examination is not convincing that the jury verdict of death should be set aside for that reason, if true. Also, the record reveals the rebuttal testimony of Lowndes County Deputy sheriff Luther James Williams during the sentencing phase and after appellant'st o and relating in detail his actions in kidnapping Mrs. Lowe and forcibly carrying her to the wooded area hereinabove

described and placing a bullet in her head. The principal reason given by him in confessing all crimes regarding Mrs. Lowe and other murders and armed robberies was that he had become a Christian. A careful reading of appellant's testimony both direct and on cross examination is not convincing that the jury verdict of death should be set aside for that reason, if true. Also, the record reveals the rebuttal testimony of Lowndes County Deputy sheriff Luther James Williams during the sentencing phase and after appellant's testimony to the effect that during the nighttime while he was dispensing medication to the inmates of the Lowndes County Detention Center, he overhead appellant telling a trusty that "he [Pruett] had eleven more placed to go to and out of those eleven places someone was gonna make a mistake and that he was--that--that he was gonna make his move then and if anyone got in his way, it was more than likely gonna be

trying to save his own hide." The jury certainly had the privilege to weigh the above statement of appellant against his prior confession allegedly because of regligous convictions.

Regarding the attorneys appointed by the trial court to represent appellant, we feel it our duty to find the following as facts. The attorneys appointed by the court were those of much experience particularly in defending persons accused of crimes both in this state and other states. They are experienced trial attorneys. Their reputation is that of high competence both in preparation and trial. a thorough study of the record reveals that they performed a thoroughly adequate defense of appellant in the trial court. The briefs and arguments before this Court were highly competent.

From our knowledge of trial attorneys and particularly the defense of cases such as the one sub judice, it would be hard to secure more competent and experienced attorneys and one who would have conducted a better defense than was given appellant. They were not "effective" in securing an acquittal, but that was not because they failed to provide appellant competent, proper and fully adequate legal services.

The cause is affirmed and the 13th day of April, 1983, is hereby set for the execution of the death sentence of appellant as provided by law.

AFFIRMED.

WALKER, P.M., and ROY NOBLE LEE, HAWKINS, DAN M. LEE, PRATHER and ROBERTSON, JJ., concur.

PATTERSON, C.JU., and BROOM, P.J., concur in part, and dissent in part.

BROOM, presiding Judge, concurring in part and dissenting in part:

As to the jury's finding Pruett guilty as charged, I concur fully with the majority in its affirmance. I would add that a more horrifying and brutish killing cannot be imagined. The act justifies the sentence if properly fixed according to law, but here serious difficulties are manifested by the record insofar as the jury's fixing the death penalty is concerned. For the following reasons, another jury, properly qualified and constituted should set the penalty.

TRUTH has long been the capstone of all judicial proceedings in western civilization. This is so regardless of pardon.

A little later, the district attorney, Mr. Peters, propounded questions to juror Graham as shown by the following except from the record:

> BY MR. PETERS: You said on your form when they asked "What do you think of the death penalty?", you put "yes". When the Judge asked you, you said you could not vote for the death penalty even though guilty. I don't mean--I'm asking--whether the issue may be a $10.00 loan owed a lender, or the guilt of one who appears to have perpetrated the most heinous and calloused killing. In the early state of Pruett's trial while jurors were being qualified, juror Graham was voir dired and the following is excerpted from his testimony:
>
> BY MR. GRAHAM: I--I could--could not vote for the death penalty even though he was guilty.
>
> BY THE COURT: What about a vote of guilty as explained to you?
>
> BY MR. GRAHAM: Right, I could vote guilty. For life in prison without
>
> BY MR. GRAHAM: I--I could--could not

vote for the death penalty even though he was guilty.

BY THE COURT: What about a vote of guilty as explained to you?

BY MR. GRAHAM: Right, I could vote guilty. For life in prison without pardon.

BY MR. GRAHAM: I--I could--could not vote for the death penalty even though he was guilty.

BY THE COURT: What about a vote of guilty as explained to you?

BY MR. GRAHAM: I--I could--could not vote for the death penalty even though he was guilty.

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even though guilty. I don't mean--I'm asking--

BY MR. GRAHAM: On the--on--

BY MR. PETERS: Did you make a mistake on the form?

BY MR. GRAHAM: On the first part, I could convict him, but on the last part, I could give him life--sentence him without--to life imprisonment without pardon, but according to my conscience, I couldn't give him the death penalty.

BY MR. PETERS: You could not vote for the death penalty in any circumstances?

BY MR. GRAHAM: Right.

BY MR. PETERS: And you would not be able to follow the law and put aside your personal convictions and vote for the death penalty in a proper case.

BY MR. GRAHAM: No, sir.

After the state failed to peremptorily excuse juror Graham, he was accepted by the defense. Later the district attorney, the Honorable Ed Peters, stated, "We have made an error beyond all errors", and he unsuccessfully sought to have juror Graham replaced by an alternate. Graham was left by the trial judge on the jury and concurred with the other jurors in fixing the death penalty. In so doing, Graham's action was in direct contradiction to what he stated under oath when questioned in open court by the circuit judge and district attorney who later confessed "error beyond all errors".

Majority of the Court takes the position that juror Graham had the right to change his mind after hearing the testimony. If that be in keeping with justice based upon untarnished truth, then why inquire of jurors about their present

philosophy concerning death penalty, as we have done through the years before prospective jurors are allowed to become one of the "sacred twelve"? Jurors must be accepted or challenged on what their philosophy is prior to hearing any proof even though testimony may persuade a juror to abandon his or her philosophy. My view is that the trial judge, the prosecutors, and defense lawyers should be able to rely upon what a prospective juror states under oath as to his feelings or philosophy about an issue which is presently to be tried whether death penalty or some other matter such as whether a juror believes in the law of self defense, etc. Stated differently, the judicial process should not be concerned with a juror's right to change his mind as with the confidence of a litigant (including counsel) to accept as true what a

prospective juror states concerning his convictions regarding justice and rectitude. This Court should not accept less than fidelity to his oath on the part of a juror. Suppose in another case self-defense is an issue, under the majority opinion a juror might being his service in a trail saying he believed in the fight of self-defense and then change his mind.

No case is cited by the majority opinion or by the state in its brief which removes the "taint" resulting in the present trial by the inadvertent error of the prosecution. In order that the "taint" be expirated, the punishment of the defendant should be determined by another panel of jurors who will themselves, with fidelity to their solemn oaths, discharge their duty as fair and impartial jurors.

PATTERSON, C.J., joins in this opinion.

EDITOR'S NOTE

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Supreme Court, U.S.
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No. 86-1302

IN THE —

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MORRIS THIGPEN, Commissioner, Mississippi Department of Corrections, EDDIE LUCAS, Warden, Mississippi State Penitentiary and STATE OF MISSISSIPPI

Petitioners,

vs.

MARION ALBERT PRUETT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in this case when it has just denied certiorari on the identical question presented here in Thigpen v. Wheat, U.S. S.Ct. No. 86-1032, 55 U.S.L.W. 3637 (March 23, 1987)?

2. Whether this Court should grant certiorari when the contentions put forward by the state were not raised in the state courts or the District Court and were put forward for the first time in the State's reply brief at the Court of Appeals?

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No. 86-1302

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MORRIS THIGPEN, et al.,

Petitioners,

vs.

MARION ALBERT PRUETT,

Respondent.

Brief in Opposition
to petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

Respondent, Marion Albert Pruett, respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF THE CASE

The Commissioner of the Mississippi Department of Corrections and others [hereinafter "the State"] seek review by this Court of an unpublished decision of the Court of Appeals for the Fifth Circuit affirming an order of the United States District Court for the Northern District of Mississippi, granting habeas corpus relief to Marion Albert Pruett.

The State presented a single question to the Court of Appeals in its opening brief: whether a recently adopted procedural rule constituted an adequate and independent state ground to preclude federal review of the constitutional issues presented by Mr. Pruett. Before deciding this case, the Court of Appeals concluded in another case that it did not. Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), cert. denied, ___ U.S. ___, 55 U.S.L.W. 3637 (1987). This case involves the same procedural rule as Wheat. The Court of Appeals found this case fully controlled by Wheat.

The State sought certiorari in Wheat, presenting the same

question to this Court that it now presents in this case.[1] The petition was denied on March 23, 1987. Thigpen v. Wheat, U.S. S.Ct. No. 86-1032, 55 U.S.L.W. 3637 (March 23, 1987).

Mr. Pruett was convicted of capital murder and sentenced to death in 1982 by a Mississippi court for a homicide that occurred in Alabama on September 17, 1981. The decedent was abducted from a savings and loan association office in Jackson, Mississippi on that date, and transported to Sumter County, Alabama, where she was fatally shot.

During jury selection, both the prosecution and the defense moved that one prospective juror, Ronald Smith, be stricken for cause due to his bias against Mr. Pruett. R. 586-87, 616. However, the court refused to excuse the juror, who was among those who decided Mr. Pruett's guilt and sentence. Both the District Court and the Court of Appeals concluded that the refusal to excuse the juror denied Mr. Pruett's rights under the Sixth Amendment.

The trial was conducted in a highly emotional atmosphere in which the spectators openly wept before the jury and applauded the announcement of the verdict of guilty and the sentence of death. R. 1006, 1112. The prosecutor contributed to the situation by introducing a picture of the victim's decomposed body which was found some forty days after she was killed, R. 857-860; presenting evidence of other criminal charges, unrelated to the charges before the court, R. 729, 765, 734-35, 778, 787, 794, 800, 928, 958, 963; and concluding both phases of the trial with highly inflammatory closing arguments, R. 1001-1005, 1074-1080, 1097-1110. The jury found Mr. Pruett guilty of capital murder on April 8, 1982, and sentenced him to death the same day.

The Mississippi Supreme Court affirmed. Pruett v. State, 431 So.2d 1101 (Miss. 1983), cert. denied, 464 U.S. 865 (1983).

Mr. Pruett sought leave to file a writ of error coram nobis in the Mississippi Supreme Court. The Court refused to grant

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1. See Petition for a Writ of Certiorari in Wheat, No. 86-1032 at i.

leave and denied relief, declining to review a number of claims based upon a procedural rule it had recently announced in Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983). Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984).

REASONS FOR DENYING THE WRIT

The Petition for A Writ of Certiorari herein presents two questions. This Court has already denied review of the first question when it was presented in an identical manner in Thigpen v. Wheat, U.S. S.Ct. No. 86-1032, 55 U.S.L.W. 3637 (March 23, 1987). The second question was not properly raised in the courts below and, therefore, should not be reviewed by this Court.

Moreover, the decision below does not involve any substantial question of federal law which has not been settled by this Court, or a conflict between decisions of other courts or this Court. This case therefore fails to satisfy any of the considerations governing review on certiorari set out in Rule 17 of the Rules of this Court.

I. THE APPLICATION OF ITS DECISION IN WHEAT v. THIGPEN TO THIS CASE BY THE COURT OF APPEALS PRESENTS NO QUESTION WORTHY OF RESOLUTION BY THIS COURT.

The first question and argument contained in the Petition for Certiorari herein are virtually identical to those presented to this Court in Thigpen v. Wheat, No. 86-1032.[2] Indeed, the question and heading to the first argument, taken verbatim from Wheat, indicate that this case involves improper closing argument,[3] which was the issue in Wheat, but is not involved in this case. This Court denied the petition in Wheat. 55 U.S.L.W. 3637. There is no reason to reach a different result here. The Court of Appeals relied entirely upon Wheat in reaching the same

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2. The question presented is exactly the same. Compare Petition for a Writ of Certiorari in Wheat at i, with Petition herein at i. Pages 11-53 of the Petition for Certiorari herein are identical to pages 10-53 of the Petition in Wheat, except that a few references to Wheat have been added to the Petition in this case.

3. See Petition for a Writ of Certiorari in Wheat at i, 10; Petition for a Writ of Certiorari herein at i, 11.

conclusion in this case. Therefore, the petition in this case should be denied as well.

In Wheat v. Thigpen, the Court of Appeals for the Fifth Circuit found that Mississippi had departed from its long-standing practice of reviewing claims raised for the first time in applications for post-conviction relief. 793 F.2d at 627-627. The Mississippi Supreme Court announced in Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983), that it would no longer consider such claims and immediately applied the rule by declining to consider several of Wheat's claims. The Fifth Circuit concluded that because it had not been previously announced or followed, the newly-adopted procedural rule did not constitute an adequate and independent state ground that prevents vindication of constitutional violations in the federal courts. Wheat v. Thigpen, 793 F.2d at 627.

It is well established that a state court's decision that a claim was forfeited in state court may be deemed to be independent and adequate state law grounds and prevent federal court review. However, as the Court of Appeals observed in Wheat, 793 F.2d at 624, there is an exception which is applicable here. Federal courts will not recognize a procedural forfeiture unless the state court relied on procedural rules and requirements which were clearly announced to the defendant and his counsel and regularly followed at the time of his trial or appeal. Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965); James v. Kentucky, ___ U.S. ___, 104 S.Ct. 1830, 1835, 80 L.Ed.2d 346, 353 (1984) (only state procedural rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"). In addition, to be valid, the procedural bar must be fairly applied to all litigants. Hathorn v. Lavorn, 457 U.S. 255 (1982); Barr v. City of Columbia, 378 U.S. 146 (1964).

Because such procedural defaults-"prevent implementation of a federal right[,] . . . the question of how and when defaults in compliance with state procedural law rules can preclude [the]

consideration of a federal questions is itself a federal question." Henry v. Mississippi, 379 U.S. at 447.

Thus, the Court of Appeals was required to determine whether the procedural rule announced in Wheat was clearly announced to litigants and their counsel and fairly and consistently applied. Such an analysis is consistent with the analysis used by all other federal courts that have addressed the issue. See, e.g., Spencer v. Zant, 781 F.2d 1458 (11th Cir. 1986)(en banc) (court is not precluded from reviewing claim by state procedural bar which was retroactively applied); Granviel v. Estelle, 655 F.2d 673, 679 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) ("We cannot enforce against Granviel a contemporaneous objection rule that apparently did not even exist at the time of his trial"); Lumpkin v. Ricketts, 551 F.2d 680, 682 n. 2 (5th Cir. 1977), cert. denied, 434 U.S. 957 (1977) (applying state law in effect at time of trial); Freeman v. Georgia, 599 F.2d 65, 71 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (rejecting state finding of procedural waiver where the court did not cite specific rule which was violated); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir. 1982), cert. denied, 459 U.S. 976 (1982) (examining state's claim of procedural bar, and finding no such procedural rule).

In Wheat, the Court of Appeals surveyed the law of a state within its circuit and found that "[i]n the years immediately preceding Wheat's appeal the Mississippi Supreme Court routinely reviewed claims made for the first time on writ of error coram nobis." 793 F.2d at 625.[4] This Court customarily defers to courts of appeals on questions of state law, and the state courts' use of procedural bars. Rummel v. Estelle, 445 U.S. 243, 267, n. 7 (1980).

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4. Although now asserting that this was not the case, the State has acknowledged in its pleadings that during this time the Mississippi Supreme Court "considered with few exceptions all claims" presented in a post-conviction petition. State's "Response to Application for Leave to File a Petition for Writ of Error Coram Nobis and/or Writ of Habeas Corpus" filed in Edwards v. Thigpen, introduced as an exhibit in the District Court below, at 22 [emphasis added].

The Court's conclusion is borne out by a review of the decisions in which the Mississippi Supreme Court routinely ruled on the merits of all claims raised by death-sentenced inmates for the first time in petitions for writs of error coram nobis.[5] See, e.g., Bell v. Watkins, 381 So.2d 118 (Miss. 1980); In re Jordan, 390 So.2d 584 (Miss. 1980). In Bell, the Court "carefully and meticulously considered each allegation" on the merits, including seventeen claims which were raised for the first time on coram nobis. 381 So.2d at 119. Similarly, in Jordan, where the petitioner raised three new claims on coram nobis, the Court discussed the issues at some length before denying them on the merits. See also, e.g., Culberson v. State, 412 So.2d 1184 (Miss. 1982) (court reaches merits of claims in coram nobis); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), rehearing denied with opinion, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983) (court finds Mississippi Court ruled on merits of claims).

Indeed, it was because the Mississippi Supreme Court was addressing the merits of claims on coram nobis that the Attorney General petitioned it to abandon its "no holds barred" approach.[6]

The Mississippi Supreme Court also recognized issues presented for the first time on coram nobis review in noncapital cases. Relying upon a Mississippi law which codified and ex-

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5. At the time of the petitions for post-conviction relief in both Wheat and Pruett, the accepted procedure was to file an application for a writ of error coram nobis. Edwards v. Thigpen, 433 So.2d 906, 907 n.1 (Miss. 1983).

6. See the State's response in Edwards v. Thigpen, quoted at some length by the Court of Appeals in Wheat, 793 F.2d 626, n. 5, in which the State asked the Mississippi court to cease it practice of reviewing all constitutional violations in order to avoid a "Crash Upon the Rocky Shores of the Federal Judiciary." The State also confessed in its brief to the Court of Appeals that "[t]he strategy of the state in the early days of capital litigation was to meet everything on the merits," but that it changed its strategy to rely instead on procedural defaults. The State overlooks the fact that this shift in strategy, without notice to the litigants, resulted in the unannounced application of the rule which will not be recognized by the federal courts as a legitimate bar. As stated by the Court of Appeals in Wheat, "The State should not be concerned with eliminating a defendant's chance to raise constitutional claims without first telling the defendant when he must raise his claims or else waive them." Id. at 626, n. 5.

panded the use of the writ, the court held that coram nobis was available for the presentation of newly discovered evidence which went to the "merits" of the trial. Lang v. State, 230 Miss. 147, 92 So.2d 670 (1957).

Later in In re Broom's Petition, 251 Miss. 25, 168 So.2d 44, 47-48 (1964), the court expressly recognized that the writ was available for claims asserting "the right to a new trial upon the ground that the sentence was imposed in violation of the Constitution". Since Broom, the court has reaffirmed that the writ is available for claims asserting constitutional violations.[7]

Thus, as found by the Court in Wheat, the Mississippi Supreme Court had consistently considered the merits of claims asserted in such applications. Then, in a trilogy of cases, the Mississippi Supreme Court announced a new policy of refusing to consider claims asserted for the first time on coram nobis in capital cases. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Smith v. State, 434 So.2d 212 (Miss. 1983). A majority of the Court reiterated that it would not review new claims in two later cases, Evans v. State, 441 So.2d 520 (Miss. 1983) and King v. Thigpen, 441 So.2d 1365 (Miss. 1983). Three dissenting justices observed that the new policy was a departure from its treatment of similar claims in previous cases in which "this Court has repeatedly allowed presentation of constitutional issues which could have been litigated at trial or on direct appeal but for various reasons were not." Evans, 441 So.2d at 525 (Robertson, J.,

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7. See, e.g., Phillips v. State, 421 So.2d 476, 483 (Miss. 1982) (coram nobis available for a "collateral attack based upon constitutional defects . . ."); Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975) ("In this jurisdiction relief for a defendant who claims to have been convicted as the result of a deprivation of his constitutional rights is by writ of error coram nobis"); Botts v. State, 210 So.2d 777, 779 (Miss. 1968) ("the violation of the constitutional right . . . to counsel constitutes ground for granting a writ of error coram nobis"); Fondren v. State, 199 So.2d 625 (Miss. 1967) (post-conviction relief granted for constitutional claim of exclusion of Blacks from juries); Windom v. State, 192 So.2d 689, 691 (Miss. 1966), ("This Court has provided a plain, adequate and speedy post-conviction remedy for adjudication of all issues that may be raised under the United States . . . Constitution").

dissenting).

The new rule announced by the Mississippi Supreme Court in Wheat, Edwards and Smith was applied to Mr. Pruett's case just a few months later. The rule had not been announced or applied at the time of Mr. Pruett's trial or his direct appeal. The Court of Appeals for the Fifth Circuit found the issue clearly governed by its Wheat decision:

> As in Wheat, Pruett completed his direct appeal before the Mississippi Supreme Court announced its new procedural rule. This circuit's decision in Wheat controls the procedural issue in this case.

Pruett v. Thigpen, Appendix to Petition for Certiorari herein [hereinafter "App."] at A7.

Wheat v. Thigpen, 793 F.2d 621, is the case in which this issue was analyzed and decided by the Court of Appeals for the Fifth Circuit. This Court denied certiorari in Wheat. There is no reason that certiorari should be granted in this case.

II. THE SECOND ISSUE PRESENTED BY THE STATE WAS NOT PROPERLY RAISED IN THE COURTS BELOW AND DOES NOT PRESENT AN IMPORTANT QUESTION WORTHY OF PLENARY CONSIDERATION BY THIS COURT.

Both the District Court and the Court of Appeals concluded that the trial court's refusal to grant a challenge for cause of a juror who indicated his bias against Mr. Pruett violated the Sixth Amendment. The State seeks review of the decision below on the basis of grounds not properly presented in the lower courts.

The State asserts that even though the defense objected once and tried to object a second time and the prosecution moved to strike the juror for cause, there was a procedural default at trial because there was not a third objection to the juror by the defense. State's Petition for Certiorari at 54-60. The State also asserts that Mr. Pruett is not entitled to relief because a peremptory challenge was not used against the juror even though Pruett exhausted all of his peremptory challenges. Id. at 60-64. These assertions were not raised in the state courts, the District Court, or in the State's opening brief in the Court of

Appeals below.[8] It was not until the State's reply brief in the Fifth Circuit that these contentions were put forward for the first time.

The Court of Appeals below rejected the State's assertion that a third objection was required:

> Counsel preserves an issue by bringing it clearly to the trial court's attention and getting a positive ruling. It certainly was not necessary to repeat an objection that had been made by both sides and directly denied by the court.

Pruett v. Thigpen, App. at A14.

The District Court raised the peremptory challenge consideration sua sponte and found that the state court had not relied upon it and the state had not asserted it. Thus, it found the issue waived. District Court Memorandum Opinion of March 21, 1986 at 17, D.Ct. R. at 153, Appendix to Petition for Writ of Certiorari herein at A48-A51 17, relying upon Washington v. Watkins, 655 F.2d 1346, 1348 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), and Wiggins v. Procunier, 753 F.2d 1318 (5th Cir. 1985). The Court of Appeals reached the same conclusion. App. at A15.

It is of course well established that a litigant may not raise new issues for the first time its reply to the arguments made by an appellee on the issue presented in the appellant's opening brief. United States v. Birdsell, 775 F.2d 645, 655, n. 4 (5th Cir. 1985); Knighten v. Commissioner of Internal Revenue, 702 F.2d 59, 60 n. 1 (5th Cir. 1983), cert. denied, 464 U.S. 897 (1983), citing Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Cir. 1981), 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3974 at 428 (1977),

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8. In state post-conviction proceedings, the State asserted only that in not assigning the error on direct appeal, Mr. Pruett accepted the trial court's determination of the matter. State's Response to Application for Leave to File a Petition for a Writ of Habeas Corpus at 21. The same assertion was made in two briefs to the District Court. Brief in Support of Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, filed on or about March 3, 1984, at 45-46; Memorandum Brief, filed on or about March 6, 1985, at Argument C (pages are not numbered). No assertion of any default at trial was made in any of the three briefs. The issue was not mentioned in the State's opening brief to the Fifth Circuit.

and 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 228.02 [2.-3] (1982).

It is also well established that this Court will not review a question not pressed or passed on by the courts below. See, e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n. 2 (1970); Husty v. United States, 282 U.S. 694, 702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927).

The issues which the State now seeks to present to this Court by way of certiorari were not properly presented to the courts below and, therefore, this Court should deny the petition for a writ of certiorari herein.

CONCLUSION

For the foregoing reasons, this Court should deny the State's Petition for a Writ of Certiorari.

This the 2d day of April, 1987.

Respectfully submitted,

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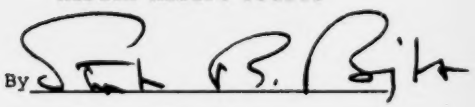
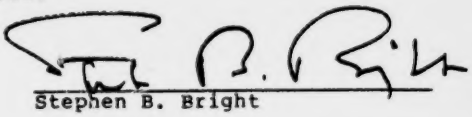
By 

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Marvin L. White, Assistant Attorney General, Post Office Box 220, Jackson, Mississippi, 39205, counsel for the respondents, by mailing a copy to him at that address, first class postage prepaid, this 2d day of April, 1985.



Stephen B. Bright